

Document:-
A/CN.4/SR.1489

Summary record of the 1489th meeting

Topic:
Most-favoured-nation clause

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

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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.

¹⁴ First agreement on trade negotiations among developing member countries of ESCAP. For text, see TD/B.609/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,

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.

Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, 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 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)¹ (continued)

1. Mr. USHAKOV (Special Rapporteur), referring to Mr. Jagota's comments at the previous meeting, wished to explain the difference between a conditional and an unconditional most-favoured-nation clause. Any most-favoured-nation clause involved conditions, if only so that its scope should be clearly defined, but conditions of that kind did not make it a conditional clause. For a clause to be conditional, the granting State had to undertake to accord to the beneficiary State the same treatment as that which it accorded to a third State, provided that the beneficiary State accorded to it some counterpart equivalent to that which it received from the third State. Conditional most-favoured-nation clauses had been common in treaties until after the First World War. It had then been realized that clauses of that kind could give rise to enormous difficulties, for it was hard to determine whether the granting State had received the equivalent treatment it had requested from the beneficiary State and whether such treatment was equivalent to that it had received from the third State. In such circumstances, it was always possible to block the granting of most-favoured-nation treatment. It was thus for practical reasons that States had stopped including conditional most-favoured-nation clauses in their agreements. In the absence of explicit conditions of material reciprocity, most-favoured-nation clauses had, accordingly, been deemed to be unconditional.

2. At the previous meeting, Mr. Jagota had also pointed out that the granting State and the beneficiary State could agree on any condition they wished. Thus the granting State could undertake to accord to the beneficiary State any treatment it accorded to a third State, with the exception of that which it accorded to a group of States. In his own opinion, however, a clause containing such a condition was not a most-favoured-nation clause; it was,

at best, a favoured-nation clause. Thus the favours that the granting State extended to a group of States and refused to extend to the beneficiary State might be greater than those it extended, in the same area, to a certain third State. If the granting State confined itself to extending favours to a single third State, a most-favoured-nation clause might be said to exist; if it extended favours to a large number of States, however, a genuine "most-favoured-nation clause", within the meaning of the term as used in the draft, could not be said to exist. Any restriction *ratione personae* prevented the clause from being a most-favoured-nation clause. It was obvious that such a clause could nevertheless apply with the mutual consent of the States in question and that there were numerous general exceptions under international law, such as the one that applied to land-locked States.

3. The CHAIRMAN recalled that it had been suggested that the Commission consider the new article proposed by EEC (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. C, 6, para. 15) for insertion after article 10. Any member wishing to comment on that proposal was of course free to do so.

4. Mr. USHAKOV (Special Rapporteur) said that, according to EEC, account should be taken of the *de facto* differences in trade conditions resulting from differences in economic systems. That applied not only to countries with centrally planned economies and market-economy countries, but also to industrialized and developing countries. But aside from any political and economic considerations, the proposed article 10 *bis* would lead to the interpretation of an unconditional clause as a conditional clause, inasmuch as, under that provision, a clause that did not actually contain a condition for real reciprocity of advantages should be interpreted as implying a condition of material reciprocity. The idea defended by EEC, as expressed in article 10 *bis*, was certainly not acceptable.

5. Mr. SUCHARITKUL said he had the impression that the legal concept of reciprocity was going to cause some legal and technical difficulties. He noted, incidentally, that reference had constantly been made to reciprocity of treatment, but never to identity of treatment.

6. The order of the articles under consideration seemed logical. It was appropriate to state first the general principle of unconditionality in the form of a presumption: unless the parties to a treaty otherwise agreed, a most-favoured-nation clause was presumed to be unconditional. The following article, relating to the effect of such a clause, gave rise to some difficulty. The application of a most-favoured-nation clause always involved three States: the granting State, the favoured State and the beneficiary State. He was not sure whether reciprocity could operate twice. The favours the granting State extended to the favoured State might already be subject to a condition of reciprocity. In such a case, would the direct application of article 9 lead to the cancellation of the condition of reciprocity contained in the agreement

¹ For texts, see 1488th meeting, para. 33.

between the granting State and the favoured State? It was difficult to answer that question and certainly neither article 8 nor article 9 could do so. The difficulty could, moreover, take a different form: if the agreement between the granting State and the beneficiary State contained a most-favoured-nation clause that was expressly considered to be unconditional, would that clause cancel out the condition of reciprocity between the granting State and the favoured State?

7. The expression "material reciprocity" was also unclear. In most cases, States sought, by means of a most-favoured-nation clause, to grant one another practical advantages. "Material reciprocity" should therefore be understood to mean some practical or tangible reciprocity. In English, however, that expression could be taken as meaning proportionate or substantial reciprocity. The solution to that problem was perhaps to be found in article 2,² paragraph (e), where "material reciprocity" was defined, but he was not sure that the explanation offered was really adequate.

8. It was uncertainties of that kind that had prompted Mr. Jagota to ask a number of questions. The Special Rapporteur had answered them by referring to articles 21 to 23 of the draft, which related to general exceptions under international law. In that connexion, he would point out that, under article 26, the granting State and the beneficiary State were free to agree on provisions other than those contained in the draft. They would therefore be free to agree on a clause similar to the one contained in the article 10 *bis* proposed by EEC. With regard to that provision, he would merely point out that, although the purpose of a most-favoured-nation clause was usually to ensure non-discrimination, there were a great many exceptions, particularly in favour of land-locked States and with regard to treatment extended to contiguous State to facilitate frontier traffic or to treatment extended under a generalized system of preferences. The world was thus divided into several categories of States, depending on their geographical location or their level of economic development. It was true that the treatment accorded by a developed State to developing countries under a generalized system of preferences did not necessarily apply to developed States, even when there was a most-favoured-nation clause, but any attempt to cater for other categories of that kind, which would not normally be accepted, would require some very thorough preliminary study.

9. Mr. TABIBI said that most-favoured-nation treatment necessarily implied a favour granted by certain States to other States. In the absence of such a favour, there could be no question of most-favoured-nation treatment. In that sense, article 10, dealing as it did with the condition of material reciprocity, differed in concept from articles 8 and 9, which dealt with the unconditionality of most-favoured-nation clauses and their effect, as well as from the draft

articles as a whole, which were designed to promote trade and mutual co-operation. It had been the view of many members of the Sixth Committee of the General Assembly that a conditional clause would do little to assist the cause of the Third World, since such a clause necessarily implied some kind of compensation on the part of the economically weaker beneficiary developing nations.

10. There was the further question of the position of the land-locked countries. In an arrangement, say, between India and Nepal relating to transit facilities, Nepal, having no port, would find it impossible to offer the same kind of facilities to India. Admittedly, reciprocity was mentioned in the 1958 Convention on the High Seas³ and also in the 1965 Convention on Transit Trade of Land-locked States,⁴ but the time had come to recognize that, in some situations, material reciprocity was not a practical proposition.

11. On that basis, he could accept draft articles 8 and 9. He could also accept article 10, although he regarded a condition of material reciprocity as more in the nature of a trade bargain between two countries and therefore not truly in keeping with the character of a most-favoured-nation clause.

12. He agreed with the Special Rapporteur regarding the new article proposed by EEC, but some further explanation of its content and purport was required.

13. Mr. JAGOTA said the remarks he had made at the previous meeting had been addressed to the way in which the application of the most-favoured-nation clause to trade and commerce might be expressed in terms of the draft, bearing in mind developments in the modern world. The commentary to articles 8, 9 and 10 brought out clearly the distinction between conditional and unconditional clauses. It also suggested that the former did not apply to trade and commerce, but only to matters such as consular relations. That might well have been true historically, but developments, both past and future, made it necessary to ascertain the extent to which such clauses were covered by the draft articles.

14. It was internationally recognized that developing countries should be free to enter into various types of association or arrangement for the purpose of promoting their economies and extending their trade and commerce. An association such as a customs union or free-trade area clearly did not fall within the scope of the draft articles. A group of developing countries might, however, enter into an arrangement for their mutual development and assistance which provided for the application of most-favoured-nation treatment as between themselves. That was by no means an unusual occurrence. The question then arose of the application of the benefits under that arrangement to another grouping to which the countries in question might also be a party. If the clause were defined in absolute terms, the effect would be

² See 1483rd meeting, foot-note 1.

³ United Nations, *Treaty Series*, vol. 450, p. 83.

⁴ *Ibid.*, vol. 597, p. 3.

that the benefits negotiated between one group of developing countries would apply automatically to another group. That, in his view, was an entirely unrealistic approach. He had referred in that connexion to the Tripartite Agreement on Trade Expansion and Economic Co-operation among India, the United Arab Republic and Yugoslavia, as well as to the Bangkok Agreement,⁵ to which several countries, including India, were parties. Similarly, 16 developing countries were parties to the GATT Protocol relating to Trade Negotiations among Developing Countries, and each of them might enter into special arrangements.

15. If it were simply a matter of applying the most-favoured-nation clause, subject to the condition of material reciprocity, then the draft articles would not cause any difficulty. Such a clause could, however, be so worded as to give rise not to the automatic but to the qualified or conditional application of the benefits enjoyed by the members of one group to those of another. He had in mind, for example, a condition providing that the members of the grouping should use their best endeavours to apply any such benefits, or that such benefits should be applicable given a certain balance of convenience. The next question, therefore, was whether such a provision should be regarded as a conditional application of the most-favoured-nation clause, and therefore as being covered by draft articles 8, 9 and 10, or as an exception, in which case it would fall either under article 21 (The most-favoured-nation clause in relation to treatment under a generalized system of preferences) or under article 3 (Clauses not within the scope of the present articles). Alternatively, it could perhaps be dealt with under draft article 26 (Freedom of the parties to agree to different provisions).

16. The Commission should take note of what was an increasingly common occurrence and at least indicate whether it regarded that occurrence as a condition or an exception to the most-favoured-nation clause, or as a matter on which the parties had complete freedom of action.

17. Mr. USHAKOV (Special Rapporteur) said that the problem raised by Mr. Jagota came under article 15, and that it would be premature to discuss the question of the right of the beneficiary State to the treatment extended by the granting State to a third State under a multilateral agreement. The special case of customs unions and similar associations of States should be left until later.

18. Mr. TSURUOKA proposed some amendments to be articles under consideration. First, in article 8, the words "is unconditional" should be replaced by the words "shall be deemed to be unconditional", which were more accurate because they expressed the idea of presumption on which the article was based. In addition, the reservation at the end of the article, reading "unless that treaty otherwise provides or the parties otherwise agree", might simply be replaced by

the words "unless the parties otherwise agree", which would fully cover the situation in which the treaty otherwise provided. Next, in article 9, the words "without the obligation to accord material reciprocity to the granting State" might be replaced by the words "immediately upon the coming into force of such a clause and without conditions". Lastly, in article 10, since the right of the beneficiary State to most-favoured-nation treatment arose as soon as the clause entered into force, material reciprocity was only a condition for the exercise of that right. He therefore proposed that the words "acquires the right" be replaced by the words "is entitled".

19. Mr. REUTER regarded Mr. Tsuruoka's proposal to replace the words "is unconditional" in article 8 by the words "shall be deemed to be unconditional" as of fundamental importance. He could accept article 8 only with that amendment, and even then with some reservations.

20. The Commission had to decide whether it intended to study certain legal devices in the abstract or from the point of view of their current practical utility. The commentary and the report of the Special Rapporteur showed that conditional clauses had at one time been in favour but were no longer used. If it were true that that time had passed and had been succeeded by an era without conditional clauses, then it would have to be said that the international community had already entered the next era. States, particularly developing countries, no longer wanted abstract equality. Just as, at the internal level, individuals were no longer satisfied with purely nominal equality, so, at the international level, States also aspired to genuine equality.

21. It was therefore not enough to say, as the Commission was saying, that the unconditional clause was the most important. In its proposed article 10 *bis* (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. C, 6, para. 15), EEC had expressed, albeit somewhat clumsily, the idea that the presumption of the unconditionality of a most-favoured-nation clause was not acceptable for exchanges of goods and services between countries with different social and economic systems. He was therefore of the opinion that, at least, a reference should be included in articles 8, 9 and 10 to the succeeding articles of the draft. However valuable it might be for industrialized States, the presumption of unconditionality was no longer valid in international relations. History had taken its course, and conditional clauses were now reappearing. For example, the treaty concluded between EEC and China contained a most-favoured-nation clause drafted in terms that clearly showed that China did not want abstract equality. The same was true of all other developing countries. That should therefore be taken into account from the outset.

22. Mr. NJENGA agreed that the Commission should revert to the important question raised by Mr. Jagota when it considered the most-favoured-nation clause as it applied to relations between developing countries *inter se*.

⁵ See 1488th meeting, foot-note 14.

23. The reason why he was unable to support the new article proposed by EEC was that the proposal was based on the assumption that there were only two economic and social systems: that of the developed market-economy countries and that of the socialist centralized-economy countries. In fact, there were many others. The existence of those two systems did not justify the creation of another category of conditional clause, which would be the effect if the relationship between those systems were omitted from the scope of the unconditionality of the most-favoured-nation clause. He also found the wording of the proposed new article somewhat difficult to understand. Who, for instance, would decide whether most-favoured-nation treatment would lead to "an equitable distribution of advantages and obligations of comparable scale"? In his view, the very purpose of most-favoured-nation treatment was to remove discrimination in trade.

24. Further, he could not agree that it was only under socialist systems that government interests played a part in national trade; even in industrialized countries they did so to a greater or lesser degree. Indeed, developing countries had found that when their textile industries had gained an advantage over those of developed countries, barriers had suddenly been erected—by governments, not by industry.

25. Trade and commerce in developing countries were in the hands both of State bodies and of free enterprise, and consequently could not be classified according to one system or another. Once exceptions were introduced on that basis, varying degrees of discrimination in trade would sooner or later inevitably appear. Qualifications in specific cases, such as in the trade agreements between EEC and China referred to by Mr. Reuter, were quite justified, but such qualifications should not be made the subject of general rules in the draft articles. That would merely pave the way for a built-in mechanism in trade, based not only on social and economic but also on political criteria, and to provide for that type of hidden discrimination would be doing a disservice to the development of international law.

26. Mr. RIPHAGEN said that possibly the most important of all the draft articles were articles 25 (Non-retroactivity of the present articles) and 26 (Freedom of the parties to agree to different provisions).

27. He fully agreed that, in its unconditional form, the most-favoured-nation clause was representative of an era in international economic relations that was now long past. The various exceptions to the clause, as well as the conditions to which it was made subject and the scope of its subject-matter, were all in fact one and the same thing, namely, exceptions to the principle of non-discrimination. The Commission would do well to make that clear, either in the body of the draft articles or in the commentary.

28. There was something to be said for making an objective difference between the various systems of trade, for if different treatment were accorded to cases that were objectively different, then in effect

there was no discrimination at all. That indeed was the basis on which treatment was accorded to developing countries, just as it was the basis for the fact that the treatment accorded to parties within an integration scheme differed from that accorded to parties outside the scheme. Such differences were a reality, and articles 8, 9 and 10 should be reworded to reflect that fact. Mr. Tsuruoka had made some interesting suggestions in that connexion.

29. Lastly, he noted a certain contradiction between article 10, which provided that the beneficiary State acquired the right to most-favoured-nation treatment "only upon according material reciprocity" to the granting State, and article 18, which dealt with the same situation, but provided that the right of the beneficiary State arose at the time of the communication by the beneficiary State to the granting State "of its consent to accord material reciprocity". In his view, article 10 offered the better formulation. He drew attention to the point because it was in the nature of a sequel to what he regarded as an artificial distinction between conditions, exceptions and the scope of the subject-matter of the clause.

30. Mr. ŠAHOVIĆ wished to return to a number of points that had already been mentioned by the Special Rapporteur and that merited further study, particularly by the Drafting Committee, which would have to find a suitable formulation for articles 8, 9 and 10. In the case of article 10, he still had some doubts about the clause subject to the condition of material reciprocity, particularly from the point of view of terminology. While he had no specific suggestion to offer, he thought the definition of "material reciprocity" given in article 2 should be made clearer and the designation of the clause itself made stricter.

31. The Commission had considered the question of the various categories of most-favoured-nation clauses. Mr. Reuter had referred to the practical use of the clause as an instrument in current inter-State relations, mainly in the sphere of international trade. He himself was in favour of a solution whereby the unconditional clause would take precedence over the clause conditional on material reciprocity. That idea should be reflected in the draft. The Commission would then be moving in the direction of a practice that was in keeping with modern conditions. It was obvious that, in practice, there were always cases that called for special solutions, and solutions that were exceptions to the rule; but, as was sometimes said, it was the exceptions that proved the rule.

32. It was necessary to bear in mind the role played by the most-favoured-nation clause in international relations, especially in economic relations, and to place it in a realistic setting. The clause, however, was only one instrument among many in a world that was trying to establish a new international economic order. For instance, account should be taken of the Charter of Economic Rights and Duties of States, article 26 of which enunciated the principles which should provide the legal basis for trade among States, regardless of any differences between their economic

systems. He therefore had some doubts as to the content of article 10 *bis*, in which it seemed that EEC had attempted to formulate a saving clause that would provide a solution to the problems faced by States with different economic and social systems. Incidentally, the Government of Hungary had commented that the clause conditional on material reciprocity applied only in certain non-commercial fields and that application of that clause under trade agreements might give rise to discrimination (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. A). The clause was thus under attack from both sides.

33. In his opinion, the solution would be to make the formulation of article 10 more explicit, so as to express the Commission's intention more clearly, but without changing the general tenor of the article.

34. Sir Francis VALLAT recalled that at the 1379th meeting of the Commission he had commented that:

Mr. Ushakov was apparently seeking a form of absolute purity, and absolute purity was rarely fruitful. If the most-favoured-nation clause were to be defined according to the very strict interpretation given by Mr. Ushakov, very few States would be likely to accept the draft articles as a convention. The Commission would thus be accomplishing very pure, but unfortunately altogether fruitless work.⁶

Those comments had been made in connexion with what had at the time been draft article D, but they were equally applicable to articles 8, 9 and 10, which were concerned with the application of the provisions of the draft and therefore could not be separated from the provisions themselves, in other words, from the draft as a whole.

35. At the twenty-eighth session, he had been virtually alone in expressing such views, but now there were signs that members were becoming conscious of the fact that unduly rigid articles would not meet the needs of the modern world. The Commission must consider the relevance of the draft to the facts of international life, and more particularly of international trade and commerce, as they had developed since the end of the Second World War. The set of articles under study might have been appropriate at the end of the nineteenth century, but with the emergence of trade groupings, which were by no means unique to Europe, the situation was now completely different. It was quite wrong to present the problem purely in terms of EEC, for such a course would blind the Commission to the needs of the vast majority of countries. As was pointed out in the comments by EEC (*ibid.*, sect. C, 6, para. 10), many customs union agreements had been concluded which set aside the most-favoured-nation clause, such as those of the West African Customs Union, CARICOM, the Arab Common Market and the Andean Group, while free-trade areas were excluded from the scope of the clause by many regional groups all over the world such as CACM, EFTA, LAFTA and the New Zealand Australia Free-Trade Area.

36. It was essential to take account of groups of that kind if the draft were to have any bearing on trade relations among the States concerned. In that context, the strict and rigid formulation of articles 8, 9 and 10 was quite inappropriate. The rules they contained were stated as absolutes, almost as if, being derived from the definition of the most-favoured-nation clause, they were a kind of *jus cogens*, which they certainly were not. Admittedly, the matter might be rectified to some extent by means of escape clauses, but it was not a valid approach to start out with three articles that were intrinsically irrelevant to modern commercial life and then, in effect, to indicate to the majority of States that they could contract out of the articles if they considered them unacceptable.

37. Part of the difficulty was that the Commission was dealing with the problem of interpreting a particular kind of clause contained in a large number of treaties and it could not take into account the context, the object and purpose of the particular treaty and all the other elements that must affect interpretation. The task was not a hopeless one, but every effort should be made to avoid the trap of undue rigidity and, what was worse, a rigidity which, in the case of articles 8, 9 and 10, also suffered from its own inbuilt ambiguity. In explaining the meaning of the terms "conditional" and "unconditional", the Special Rapporteur had very properly distinguished between a condition that was part of the content of treaty provision and a condition that brought that provision into operation. If it was true that articles 8, 9 and 10 were concerned with the content of the provision and not with the condition that might bring that provision into operation, the articles should be formulated more clearly. Some form of aid to interpretation was also required; otherwise, it would be very difficult to distinguish in a given case between something that was an integral part of a treaty provision and something that brought that provision into operation.

38. Obviously, the new article proposed by EEC (*ibid.*, para. 15) was not drafted in the kind of language normally employed by the Commission. Nevertheless, very careful consideration should be given to including in the draft a provision that expressed the idea contained in the EEC proposal. He agreed with Mr. Reuter's comments concerning the proposed article 10 *bis*. The Commission was faced with a problem of very wide interest that merited examination in connexion with articles 8, 9 and 10, which, it should be emphasized, had to be considered in relation to the remainder of the draft.

39. Mr. SCHWEBEL fully agreed that the set of articles should endeavour to grapple with reality. Accordingly, despite drafting that was not altogether clear or felicitous, the article proposed by EEC could not, from the standpoint of its substance, be dismissed lightly. From the time of Aristotle, it had been recognized that equality among unequals was inequitable. As Mr. Reuter had rightly pointed out, the matter was of universal concern, and not simply one

⁶ *Yearbook... 1976*, vol. I, p. 105, para. 33.

of East-West concern. However, the Commission could not ignore the fact that there were differences in the responsiveness of market-economy countries and countries with a centrally planned economy to most-favoured-nation provisions in the trade sphere. For example, unlike the case of market-economy countries, imports into countries with a centrally planned economy did not respond to reductions in tariffs. Mr. Njenga had been right to emphasize that the matter was one of degree and that the countries of the modern world often had mixed economies, but differences of degree could have a very substantial effect on reality—reality which had to be properly assessed by the Commission. In short, he shared the approach taken by Mr. Reuter, Mr. Riphagen and Sir Francis Vallat. The draft must cope with a very real problem but he did not think that any member of the Commission had as yet established in optimum fashion the way in which that to be done.

40. Mr. VEROSTA, referring to Mr. Jagota's remark that several unions or groupings of States had recently been established in Asia, said that it would be interesting for the Commission to see the text of the agreements in question in order to decide whether they constituted exceptions or conditions of material reciprocity. In any event, the Commission should mention those groupings in the commentary; otherwise, it might be accused of failing to take account of the most recent developments.

41. Mr. USHAKOV (Special Rapporteur) said that there seemed to be some confusion about the scope of article 8. For example, he had difficulty in understanding why Mr. Reuter found it unacceptable. Article 8 merely stated that a treaty between States could contain either an unconditional clause or a conditional clause. That was a matter of fact. The article enabled a State to insert in a clause any condition of reciprocity it wished, in which case the clause would be conditional. In its commentary, however, the Commission had noted that conditional clauses no longer existed in the contemporary world. It was possible, however, that that statement might be somewhat exaggerated and that some treaties, such as those to which Mr. Jagota had referred, in fact contained conditional clauses.

42. The question of treaties concluded between countries with different economic systems had also been raised. The point to be decided was whether there were conditional clauses in treaties between the socialist countries of eastern Europe and the capitalist countries. Although that was a possibility, there certainly were not any such clauses in the agreements concluded by the Soviet Union and the capitalist countries, in which the most-favoured-nation clause was always granted without conditions and without compensation. The idea that had served as a basis for the draft had been that clauses conditional on material reciprocity sometimes existed, for example, in the sphere of diplomatic and consular relations. That did not mean, however, that States could not conclude agreements containing conditional clauses: they were quite free to do so.

43. It would not be easy to draft a text that took account of the very rare cases in which the conditional clause required certain compensation for the grant of most-favoured-nation treatment. The Commission had not ruled out such cases, since article 8 contained the proviso "unless that treaty otherwise provides or the parties otherwise agree". In the belief that conditional clauses no longer existed or were extremely rare, the Commission had considered it unnecessary to draft a special article on the operation or application of such clauses. It would of course be possible to come back to that question, although, in its commentary, the Commission had unanimously agreed that only unconditional clauses or clauses conditional on material reciprocity were now in use. It might be possible to find a more appropriate way in which to express the idea of material reciprocity, but in economic relations such reciprocity was practically impossible; it existed only in diplomatic relations or private law relations.

44. The ideas on which articles 8, 9 and 10 were based were perfectly clear and should not give rise to any objections. It would of course be possible to improve the wording, and he would welcome any suggestion for that purpose.

45. Mr. SUCHARITKUL, referring to the discussion on article 10 *bis* proposed by EEC, said that the countries of Asia, for example, were endeavouring to promote economic co-operation by establishing regional groupings, but that they had discovered that the operation of the most-favoured-nation clause was an obstacle to such co-operation. Perhaps one way out of the difficulty was that proposed in article 26 of the draft, namely, the so-called freedom to contract. In fact, however, it was frequently difficult to bring negotiations to a successful conclusion, since the other party or parties wanted to continue to enjoy the benefit of most-favoured-nation treatment, at the expense of the particular group of developing countries. Reference had already been made to wider co-operation throughout Asia, the context of ESCAP, in the areas of trade, commerce and the exchange of goods and services, and to the fact that such specialized treatment should be excluded from existing most-favoured-nation clauses.

46. Mr. Jagota had aptly observed at the previous meeting that a country might belong to more than one regional grouping. Thailand, for instance, belonged not only to ASEAN, the members of which had the same social and economic structure, but also to the Committee for Co-ordination of Investigations of the Lower Mekong Basin, which consisted of Thailand, the Lao People's Democratic Republic, Viet Nam and Democratic Kampuchea, whose resumed participation in the Committee was awaited. It was a local geographical grouping, but the social and economic structure of Thailand was different from that of the other members. The aims of such groupings went beyond the matters dealt with in articles 22 and 23, namely, frontier traffic and the rights and facilities extended to a land-locked State. The countries of Asia wanted to be able to develop their economies in

co-operation with their neighbours, without being hindered by the operation of the most-favoured-nation clause.

47. The CHAIRMAN asked whether members of the Commission thought that articles 8, 9 and 10 could now be referred to the Drafting Committee.

48. Mr. QUENTIN-BAXTER said he was well aware of the tradition that the Commission's Drafting Committee was much more than a body that dealt with matters of form. In the current instance, however, the real subject of debate was whether the Commission proposed to alter radically the entire basis of the draft articles or whether it intended to do what was more usual on second reading of a draft, namely, to note any discrepancy or any need for adjustments to the text. The answer depended perhaps on the view taken by the Commission as to the role of the draft articles when they were completed. If the draft was to be regarded as a dominant set of provisions in international law, very careful consideration must be given to the matters raised so graphically in the course of the discussion, namely, the developments that had taken place in the sphere of trade and the fact that many States of all kinds in all parts of the world found the institution of the most-favoured-nation clause an obstacle rather than a help.

49. The previous Special Rapporteur for the topic, Mr. Ustor, despite his devotion to the task of describing the operation of the most-favoured-nation clause accurately in law, had never sought to claim a primary place for his work. He had considered that it was sufficient to describe an institution so as to enable government lawyers and others to interpret existing treaties and decide how far they wished to depart from the principles enunciated in the draft when drawing up new clauses. It might be affirmed that the draft was describing a situation that had been overtaken by new developments, particularly at the multilateral level, but the work was none the less a contribution of high scholarship that made it easier to gain an understanding of complex institutions in the modern world.

50. Personally, he was not yet persuaded that the Commission should, or indeed could, fundamentally alter the basis and the proportions of the draft articles. If the draft appeared to claim for itself too absolute a status, that danger might be avoided by making minor changes in the wording, or more probably by supplying careful, balanced commentaries. At the current stage, however, he did not think that the discussions in the Commission provided an adequate basis on which the Drafting Committee might deal with articles 8, 9 and 10, although such a basis might well emerge from consideration of the articles that followed.

51. Mr. USHAKOV (Special Rapporteur) said that the articles of the draft, in particular articles 8, 9 and 10 and articles 18 and 19, were all interrelated. The Commission could of course decide to wait until it had completed its consideration of the draft before referring the articles as a whole to the Drafting Com-

mittee. He was not sure, however, whether that was the best procedure to follow, or whether it was even possible.

The meeting rose at 1.10 p.m.

1490th MEETING

Wednesday, 31 May 1978, at 10.10 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, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Visit of the Vice-President of the International Court of Justice

1. The CHAIRMAN said that it was a great honour to extend, on behalf of the Commission, a warm welcome to Mr. Nagendra Singh, Vice-President of the International Court of Justice. Mr. Nagendra Singh had been a distinguished member of the Commission from 1967 until 1972, when he had been appointed a judge of the Court. All members were familiar with his well-known writing on international law and his learned opinions delivered at the Court.

2. Mr. NAGENDRA SINGH (Vice-President of the International Court of Justice) said that he had been very touched by the kind invitation of the Commission to attend its meeting. It brought back many pleasant memories and bore witness to the strength of the ties that linked the International Court of Justice and the Commission. There was naturally a close relationship between the Court as the adjudicator and the Commission as the codifier of international law. Without precise and unambiguous law the adjudicator would be very handicapped, but codification of international law without the existence of an adjudicatory body would be tantamount to law-making in a vacuum. Justice needed both the judge and the legislator. He wished the Commission every success in its endeavours and was sure that its work would continue to command the admiration and respect of the world.

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