

Document:-  
**A/CN.4/SR.1491**

**Summary record of the 1491st meeting**

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

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41. Mr. USHAKOV (Special Rapporteur) said that the treatment extended to the third State should be automatically extended to the State that was the beneficiary of an unconditional most-favoured-nation clause, regardless of the relationships between the granting State and the third State. Whether or not those relationships entailed compensation, they concerned only the granting State and the third State. The fact that there was a conditional clause linking them was irrelevant.

42. It might be asked whether reference should be made, in article 13, to persons and things having a specific relationship with the beneficiary State or with the third State. In fact, article 13 concerned the right to most-favoured-nation treatment and the expression "most-favoured-nation treatment", according to the definition given in article 5, covered not only the States concerned but also persons and things in a determined relationship with them.

43. It would probably be dangerous to define the term "persons" as applying equally to juridical persons and natural persons, as had been suggested. There was, in fact, a wide variety of most-favoured-nation clauses, and some might apply only to natural persons and others only to juridical persons. Only by examining each individual clause could it be determined which type of person was concerned, and the same applied to things.

44. Mr. JAGOTA said that, in his view, articles 13, 14 and 15 laid down rules of interpretation, and he therefore agreed with Mr. Calle y Calle regarding the intent of article 13. As he read it, that article referred to the rights of a beneficiary State arising under a most-favoured-nation clause. Those rights were independent of the relations between the granting State and a third State, so that such factors as the balance of advantage as between those two States, their motivation, the conditions on which treatment was extended and the nature of any compensation were all irrelevant. It was likewise irrelevant whether the clause, as it related to the rights of the beneficiary State, was conditional or unconditional; it could be either, but that matter was in any event regulated separately under draft articles 8, 9 and 10. Thus, the relations between the beneficiary State and the granting State were governed by the terms of the most-favoured-nation clause together with any conditions set forth in it, and did not necessarily have any connexion with the relations between the granting State and a third State. Viewed in that context, article 13 could serve as a useful caution to those who had to negotiate and draft most-favoured-nation clauses. They must ensure that any conditions were specified in the clause, failing which it would not be possible to rely on the relationship between the granting State and a third State.

45. For those reasons, it should be made clear in the commentary that articles 13, 14 and 15 laid down rules of interpretation on the application of the most-favoured-nation clause, and were not concerned with the substance of the rights arising under such a clause between a granting and a beneficiary State.

46. Mr. RIPHAGEN said that one of the difficulties with articles 13, 14 and 15 was that, under the draft articles, a conditional most-favoured-nation clause was nonetheless a most-favoured-nation clause. Those three articles, however, applied only in the case of an unconditional clause, whereas articles 8, 9 and 10 covered conditional clauses as well. He therefore considered that articles 13, 14 and 15 should specify whether the clause was conditional or unconditional.

47. Sir Francis VALLAT said it seemed apparent from paragraph 173 of the Special Rapporteur's report (A/CN.4/309 and Add.1 and 2) that article 13 was by implication dependent on the assumption that articles 8, 9 and 10 dealt with the condition of material reciprocity. If, however, article 10 (Effect of a most-favoured-nation clause conditional on material reciprocity) were to be amended, then the nature and content of article 13, as also of articles 14 and 15, would clearly be affected. Article 13 might be acceptable if the condition of material reciprocity were its sole basis, but the introduction of other conditions, or aspects of interpretation, would call for the most careful consideration on the Commission's part.

48. In the past, the Commission had been extremely cautious about laying down rules of interpretation and, if that were to be the sense of article 13, it would cause him no little concern. In such an event, however, the article should be reworded as a rule of interpretation and should not, as was now the case, be expressed as an absolute rule of law.

*The meeting rose at 1 p.m.*

## 1491st MEETING

*Thursday, 1 June 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, 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 13 (Irrelevance of the fact that treatment is extended gratuitously or against compensation)<sup>1</sup>  
(concluded)

<sup>1</sup> For text, see 1490th meeting, para. 26.

1. Mr. DÍAZ GONZÁLEZ said that the first question to be determined was whether the most-favoured-nation clause still existed as a reality in modern international life, bearing in mind the changes it had undergone throughout its evolution and the resultant need to regulate exceptions to its application. In practice, of course, the content of the clause differed according to whether it related to a developed or a developing country.

2. A knowledge of the history of the clause in Latin America, where it had played a significant role on the long road to integration, was of assistance in understanding the difficulties being encountered in drafting articles that would command a consensus. The trend in Latin America, as manifested at the seventh regular session of the Conference of Contracting Parties to the Montevideo Treaty and during the first round of collective negotiations of LAFTA (Buenos Aires), was to affirm the principle of equality of treatment and the removal of barriers and restrictions. Such a policy could not be the most suitable one for countries embarking on industrial development, since it did not permit them to compensate for the difference in costs between their own production and that of more developed countries. Equality of treatment and the removal of barriers tended to create an international division of labour, so that many American countries were condemned indefinitely to agricultural production and production of primary commodities, with all the inevitable social, political and cultural consequences. Historically, the most-favoured-nation clause had been seen as an instrument of free trade that would halt protectionist trends, eliminate discriminatory treatment and create an international division of labour that favoured, first and foremost, the major industrial Powers. Cobden and other advocates of free trade had not concealed their hope that the developed countries, particularly England, would thus achieve an industrial monopoly throughout the world.

3. He did not intend to deal with the extent to which the theoretical equality of the clause might enable the economically weaker countries to overcome the inequalities stemming from contact with economies that had developed in a different manner, or to discuss whether such a policy was the most appropriate for developing countries—the majority of which were producers of primary commodities in their trade with developed countries. In considering trade policy as an economic phenomenon, however, it was impossible to disregard the relationship deriving from trade between countries with economies of different structure, of which the agreement between EEC and the People's Republic of China was a case in point.

4. The American nations had carried their enthusiasm for the principle of equality of treatment, as the basis of any acceptable trade policy, to the extent of advocating the insertion in all trade agreements of the most-favoured-nation clause in its unconditional form. That gesture was all the more generous and symbolic in that it had coincided with an unprecedented increase in the barriers and restrictions im-

posed in international trade, which had had such unfavourable effects on those nations; it meant, in fact, applying the clause to countries which, for their part, were applying restrictive systems.

5. The American nations had adopted the conditional form of the clause as a compromise between most-favoured-nation treatment and a system of particular reciprocal treatment. Thus the benefits granted to one State in return for certain advantages on favours would be granted to third States, only by means of equivalent concessions.

6. However, the situation had changed yet again and the Third World was now calling for something tangible rather than mere promises. Developing countries were seeking to integrate, as indeed were developed countries, and there was a growing trend to achieve such integration by creating associations of States. The constituent instruments of those associations defined what was to be understood by a most-favoured-nation clause, and regulated the legal conditions for its application. Thus, resolution 222 (VII) of the seventh regular session of the Conference of Contracting Parties to the Montevideo Treaty established that "the tariff reductions provided for the subregional agreement shall neither be extended to contracting parties which do not participate in the subregional agreement, nor create for them special obligations".<sup>2</sup> That resolution also provided the legal basis for article 113 of the Cartagena Agreement,<sup>3</sup> which in turn laid down that the advantages provided for in the Agreement should neither be extended to non-participating countries nor create obligations for them.

7. For those reasons, he shared the concern expressed regarding the scope of article 15 (Irrelevance of the fact that treatment is extended under a bilateral or a multilateral agreement),<sup>4</sup> and fully agreed with the comments of the Board of the Cartagena Agreement (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. C, 4) regarding the possible consequences of that article. In his view, some formula should be evolved for excluding from its terms customs unions, free-trade areas and similar associations.

8. The Commission, in its work of codification, could adopt formulae that either converged towards international reality or followed a course parallel to it. Depending on the course it adopted, the rules it prepared would either come into effect under international law or, if they were not ratified by the majority of States or became anachronistic at the moment of their approval, would remain a dead letter.

9. Mr. QUENTIN-BAXTER said that, during the course of its deliberations, the Commission had be-

<sup>2</sup> LAFTA, *ALALC Síntesis mensual*, Montevideo, Fourth Year, No. 31, January 1968, p. 25.

<sup>3</sup> Subregional Integration Agreement (Andean Pact), signed at Bogotá, 26 May 1969. For English text, see American Society of International Law, *International Legal Materials*, 1969, Washington, D.C., vol. VIII, No. 5, September 1969, p. 910.

<sup>4</sup> See 1483rd meeting, foot-note 1.

come increasingly aware that the difficult problem referred to it by EEC was actually or potentially analogous to other problems that might arise in relation to customs unions or other similar associations of States, and, further, that negotiations on trade were now conducted mainly in the multilateral context and against a background of assumptions that were quite different from those which, historically, had governed the most-favoured-nation clause. EEC, in his view, had been entirely right to draw the Commission's attention to the special situation of a body that acted in place of a State for a given purpose, and there was no need for any emotive reaction to such a development in the contemporary world. It was just as important for those members of the international community that had dealings with EEC to have assurances regarding its contractual arrangements as it was for the members of EEC itself.

10. Among those who upheld the concept of EEC as a body that acted in the place of its member States for a particular purpose was Sir Francis Vallat; at the other end of the spectrum, Mr. Riphagen had suggested that the solution to that and other problems might well be to extend the scope of the draft articles to relations between States and international organizations.<sup>5</sup> It was a wide question, and one that most members would feel unable to resolve in the narrow context of the second reading of the draft articles. At the same time, it was easy to recognize a certain interplay between the problems arising from those articles and the problems arising in relation to the draft articles on treaties to which international organizations were parties. That was why he considered, at that point at least, that little progress would be made in either sphere unless a fairly clear distinction were made between things done *qua* State and things done *qua* international organization.

11. What should have emerged from the Commission's earlier discussion was a clear recognition that treaties concluded by EEC, or any similar body, on behalf of its member States with other States were analogous in spirit to the classic cases of agreements between States with which the Commission was dealing. He would therefore have hoped that the draft articles prepared by the Commission would be helpful in that context. If the Commission had been unable to find a place within the structure of the draft articles for the particular problem posed, it was perhaps because the choice between State and international organization was a difficult one and because EEC displayed certain tendencies that were still the subject of doctrinal debate between it and its members.

12. What had actually resulted from the Commission's earlier discussion was the referral of the problem to the Drafting Committee, and an uneasy feeling with regard, first, to the particular case of a customs union or a more integrated body of States, and

then to the fact that, in the modern world, States did not ordinarily contract solely on the basis of the mechanism provided by the most-favoured-nation clause. There might therefore be some justification for a feeling of uneasiness about the scope of the concept of material reciprocity in the earlier draft; in practical terms, however, it could be accepted that, although such a distinction was not of importance in trade, it might have some residual value in regard to treaties dealing with establishment and non-trade matters. That should not, however, divert the Commission from its original approach, namely, that it was the most-favoured-nation clause in its unconditional form which was typical and which it was seeking to describe.

13. That was the approach to adopt in the discussion on draft articles 8, 9 and 10 and, in particular, on the amendments proposed by Mr. Tsuruoka.<sup>6</sup> If the purpose of those amendments was to make it clearer to the reader that the matter which the Commission sought to describe was a classic phenomenon, and that it was the rule rather than the exception to modify the clause when dealing with it, then those amendments might have their proper place, and it might well be necessary to include in the draft a few more pointers to indicate its relationship to the modern world. If, on the other hand, those amendments meant that the Commission would be faced, as it apparently now was, with a strengthened case for re-writing each successive article, then, in his view, the basically sound structure of the draft might ultimately be subjected to intolerable strain. The Commission was thus faced with a major decision. There was no real doubt that it was describing a classic phenomenon. If States were given proper notice of their right to modify the clause and adequate warning as to the presumptions that would be drawn if they did not do so, then the classic treatment of the clause still had a significant place and the Commission would owe no one an apology for spending time in producing the draft articles. But if the most-favoured-nation clause came to be viewed not as a fixed point of departure but as a movable one, it would be entirely divested of its existing value. The only choice then open to the Commission would be to make such a radical revision that further reports introducing new material of great complexity would be required before it could claim to have done a sound professional job.

14. Bearing all those facts in mind, he considered that article 13 was adequate for the purpose for which it was intended, and he saw no reason in principle why it should not apply, in the general context of the draft, to a conditional most-favoured-nation clause. He would have no objection to any drafting changes that would clarify the reader's understanding of the purpose of the draft articles and their relationship to broader areas. He trusted, however, that the Commission could work within that context, as indicated by the general tenor of the comments

<sup>5</sup> 1485th meeting, para. 11.

<sup>6</sup> See 1489th meeting, para. 18, and 1490th meeting, para. 6.

submitted by governments and made by their representatives in the Sixth Committee of the General Assembly.

15. Mr. FANCIS said that, to someone from the Third World, article 9 (Effect of an unconditional most-favoured-nation clause) and article 10 (Effect of a most-favoured-nation clause conditional on material reciprocity) indicated the need for extreme caution, when concluding treaties, in approaching a most-favoured-nation clause. There was an obvious link between article 9 and article 13, since the latter dealt substantially with a situation that could be inferred from the former. Moreover, the commentaries to articles 4 (Most-favoured-nation clause) and 5 (Most-favoured-nation treatment) were most instructive with regard to article 13. He noted, in particular, that a most-favoured-nation third State might be less favoured than a beneficiary State. He also noted that a most-favoured-nation clause might exactly define the conditions for the operation of the clause and that if, as was usually the case, the clause itself did not provide otherwise, it was at the moment when the third State received treatment falling within the ambit of the clause that the beneficiary's rights came into being. Consequently it seemed that, when treatment was extended gratuitously to a third State, the beneficiary State must receive treatment that was no less favourable. When treatment was extended against compensation, either the condition of material reciprocity would apply under article 10, or under article 9, it would not apply. Further, articles 5 and 9, read together, would negative the application of the condition of material reciprocity to a most-favoured-nation clause enjoyed on unconditional terms.

16. In the light of those considerations, he agreed that article 13 had its place in the draft. It might overlap with article 9, but the draft articles formed an integrated whole and could not be separated into watertight compartments. The proper place for article 13 (and possibly also for article 14) was closer to the articles with which it had a direct and consequential relationship, namely, articles 9 and 10. That view, indeed, was borne out by paragraphs (7) and (8) of the commentary to article 13, which stressed the unconditional character of the clause. He also agreed that the first part of paragraph (7) of the commentary required some clarification.

17. Mr. TSURUOKA, noting that several members of the Commission had referred to article 10, to which he had proposed the addition of a second paragraph,<sup>7</sup> wished to offer some further explanation of the reasons that had led him to submit that amendment. The proposed new paragraph explained how the beneficiary State acquired the right to most-favoured-nation treatment when the clause was made subject to conditions other than a condition of material reciprocity. Many members of the Commission had said that the articles of the draft did not really

reflect developments in the contemporary world, and their concern should be taken into account.

18. Although the Special Rapporteur had said that it was extremely rare for a most-favoured-nation clause to contain conditions other than a condition of material reciprocity and that it was therefore unnecessary to mention those other conditions in the draft, he considered that the Commission should acknowledge the current trend to revert to a former practice, and seize the opportunity to take a step forward in the progressive development of international law. The Special Rapporteur had also said that, in so far as they existed, conditions other than that of material reciprocity were extremely varied and that it would be difficult to cover them all in a single provision. In his own opinion, all that was needed was to indicate how the beneficiary State could obtain most-favoured-nation treatment when the clause was coupled with one of those many conditions. It was enough if that condition were met; the Commission did not have to say how it should be met, since that was a matter for the primary rules. The Special Rapporteur had also pointed out that some conditions were, in fact, only limitations. However, chanceries would now be able to distinguish between limitations and conditions by referring to the last phrase of the proposed amendment.

19. He was in favour of retaining article 13, for it was a very important provision; it dealt with an actual situation that was the outcome of the development of the most-favoured-nation clause. On one point, however, he did not share the view of the Special Rapporteur: he did not think article 13 was limited to unconditional most-favoured-nation clauses. The article merely indicated that the relationship between the granting State and the third State was independent of the relationship between the granting State and the beneficiary State under a most-favoured-nation clause. It was an entirely different matter to refer to that clause to determine whether it was conditional or unconditional.

20. He proposed that the words "or other conditions" be added at the end of article 13, since the meaning of the word "compensation" was very restricted.

21. It would be helpful to include a definition of the terms "persons" and "things" in article 2, on the use of terms, making it clear that those terms denoted, respectively, physical and legal persons, and tangible and intangible objects, including goods, vessels and aircraft.

22. Sir Francis VALLAT said that the words "under a most-favoured-nation clause", at the beginning of article 13, appeared to be entirely general, which was partly why some members were concerned that, if there were provisions or circumstances affecting the character of the clause, the article could be read as applying. He did not think that was the true intention, his understanding being that the article was intended to apply to unconditional clauses. That, in his view, was the nub of the whole problem. As a mem-

<sup>7</sup> See 1490th meeting, para. 6.

ber of the United Kingdom Foreign Office, he had been concerned to defend the unconditional character of the most-favoured-nation clause over a number of years. For example, he had held the view that, in the case of a clause operating between the United Kingdom and another State which was not subject to qualifications in itself, if the other State extended treatment to a third State subject to some kind of favour, the United Kingdom was entitled to claim the benefit of that treatment under the most-favoured-nation clause without having to accord the same favour to the other State. That was a traditional view of the ordinary clause in a standard bilateral commercial treaty, but it was not a view that was always accepted. One of the merits of the draft articles, therefore, would be to clarify that particular situation. At the same time, article 13 should not be so written as to cover ground that it was not intended to cover. Possibly, therefore, the problem might be dealt with partly by redrafting the text of the article and partly in the commentary. He, for his part, would not wish to dissent from the real intent of article 13.

23. In suggesting at the previous meeting that the Commission should consider a definition of the word "persons", and therefore by implication "things", it had not been his intention that the Commission should endeavour to define those terms for the purpose of each and every most-favoured-nation clause. His concern was that, as used in the draft, "persons" might assume either a natural or a corporeal sense. What was needed, therefore, was not a definition in the strict sense, but a definition to show that juridical persons were not excluded. The definitions proposed by Mr. Tsuruoka might offer a satisfactory solution.

24. Mr. SUCHARITKUL said that, if the most-favoured-nation clause was to continue to be of use in the future, it was essential to take account of the realities of international relations. Articles 13, 14 and 15 strengthened the clause in favour of beneficiary States at the expense of granting States, the latter generally, although not necessarily, being developing countries. He therefore welcomed Mr. Tsuruoka's proposal for the addition of a second paragraph to article 10, since it would somewhat redress the balance in favour of the granting State and thus improve the draft articles as a whole. The new paragraph would not entirely dispel his misgivings, but it would serve as a clear pointer to parties concluding or negotiating a most-favoured-nation clause.

25. Although he was prepared to accept the proposed new paragraph as it stood, he thought it preferable to use some such wording as "in accordance with" rather than "upon fulfilling", in view of the two types of conditions involved, namely, condition precedent and condition subsequent.

26. The CHAIRMAN, speaking as a member of the Commission, expressed the view that article 13 was both necessary and well placed in the draft as a whole. It reinforced the principle of the unconditionality of the most-favoured-nation clause, which was the cornerstone of the whole draft. It distinguished between

two kinds of relationship involved in a most-favoured-nation clause: on the one hand, that between the granting and the beneficiary State and, on the other, that between the granting State and a third State. Although the former, by definition, was unconditional, the latter could be made subject to conditions. That was the sense of the article, which was abundantly clear and could therefore now be referred to the Drafting Committee.

27. The meaning of the term "persons" could be clarified in the commentary; no further definition need be included in article 2.

28. Mr. USHAKOV (Special Rapporteur) said that, in his opinion, the idea on which article 13 was based was very clear: in the case of an unconditional most-favoured-nation clause, the beneficiary State acquired, without compensation, the right to the treatment extended to the third State, whether that treatment had been extended gratuitously or against compensation. A slight change in the wording of the article was all that was needed in order to reflect that idea, precisely as it was explained in the commentary. The beginning of the article might read:

"The beneficiary State acquires, without compensation, under a most-favoured-nation clause which is not made subject to conditions of compensation,..."

The addition of those words was all the more necessary since the following article related both to conditional and unconditional clauses.

29. Since article 13 was linked to article 9, the exact meaning of an unconditional clause should also be defined in the latter article. For that purpose, the words "of compensation" should be inserted after the words "if a most-favoured-nation clause is not made subject to conditions", at the beginning of the article, and the words "material reciprocity", at the end of the article, should be replaced by the words "any compensation". If it were drafted in that way, article 9 would become a general provision on the unconditional most-favoured-nation clause.

30. Since members of the Commission seemed to be in general agreement on the principle stated in article 13, the article should now be referred to the Drafting Committee.

31. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 13 to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*<sup>8</sup>

32. Mr. RIPHAGEN said that the Commission would meet with far fewer difficulties if the scope of the draft were confined to unconditional most-favoured-nation clauses. Whenever the discussion turned to clauses that were not unconditional, problems arose because it was not possible to legislate for

<sup>8</sup> For consideration of the text proposed by the Drafting Committee, see 1521st meeting, paras. 46 and 47.

all conceivable types of conditions. It was then necessary to resort to articles of a tautological character. One course that the Commission might consider would be to start the draft with what were now articles 25 and 26, which specified that the draft applied only to most-favoured-nation clauses contained in treaties concluded after the entry into force of the draft and that the parties were free to agree to different provisions. In that way, a model of interpretation would be provided for a particular kind of clause—the unconditional clause—and the object and purpose of the draft would be made clear from the outset.

33. The CHAIRMAN suggested that the Drafting Committee should consider the idea put forward by Mr. Riphagen.

34. Mr. JAGOTA said that although he had no objection to the question of the order of the articles being referred to the Drafting Committee, further reflection was required with regard to the substance of Mr. Riphagen's suggestion, since the very scope of the draft would be affected if the articles were confined to unconditional clauses. It had already been pointed out, particularly by the Special Rapporteur, that the conditional clause applied generally, although not always, in the sphere of trade and commerce, whereas conditional clauses were normally encountered in consular matters, questions of diplomatic privileges and immunities, access to ports, and so on. The purpose of the current study was to clarify, with respect to the most-favoured-nation clause, the operation of the general provisions of the Vienna Convention on the Law of Treaties<sup>9</sup> and their effects for third parties. The draft should therefore cover both unconditional and conditional clauses. If the set of articles dealt exclusively with unconditional clauses, it might be asked later why the topic had been referred to the Commission rather than to UNCITRAL—and, what was more, the draft might very well fail to take account of reality, even in respect of trade and commerce.

35. Mr. ŠAHOVIĆ thought, like Mr. Jagota, that the question raised by Mr. Riphagen related to the basic structure and purpose of the draft. He supported Mr. Riphagen's suggestion in principle, because in order to be able to lay down rules for the use of the most-favoured-nation clause it was essential to maintain a consistent line throughout the draft.

36. The main purpose of the draft as it now stood seemed to be to resolve the problems raised by the use of the unconditional clause. If the Commission had dealt with the question of the clause conditional on material reciprocity, it was because that clause still survived in certain spheres of relations. Various articles dealt with other exceptions or special situations. The question of the clause conditional on material reciprocity could therefore be examined; with regard to the use of the most-favoured-nation clause in international relations, however, and especially in

economic relations, it was preferable to focus the draft on the rules for the application of the unconditional clause.

37. Mr. USHAKOV (Special Rapporteur) said that, for the time being, and as was only realistic, the draft referred to two categories of most-favoured-nation clause, namely, the unconditional clause and the clause conditional on material reciprocity. Some members had proposed the addition of provisions relating to conditional clauses other than clauses conditional on material reciprocity, but it was questionable whether that was a practical proposal in view of the difficulties involved in drafting provisions of that kind. On the other hand, if the Commission limited the draft to unconditional clauses, the sphere of diplomatic and consular relations and matters dealt with in establishment treaties would not be covered.

ARTICLE 14 (Irrelevance of restrictions agreed between the granting and third States)

38. The CHAIRMAN invited the Special Rapporteur to introduce article 14, which read:

*Article 14. Irrelevance of restrictions  
agreed between the granting and third States*

The beneficiary State is entitled to treatment extended by the granting State to a third State whether or not such treatment is extended under an agreement limiting its application to relations between the granting State and the third State.

39. Mr. USHAKOV (Special Rapporteur) said that article 14 applied both to conditional clauses and to unconditional clauses. In its commentary, the Commission had indicated that the rule stated in that article clearly followed from the general rule regarding third States contained in articles 34 and 35 of the Vienna Convention on the Law of Treaties and also from the nature of the most-favoured-nation clause itself, and that it applied to all most-favoured-nation clauses, whether they belonged to the unconditional type or took the form of a clause conditional upon material reciprocity. That rule was clear and generally accepted. Article 14 therefore gave rise to no difficulties and could be retained as it stood.

40. Mr. VEROSTA said that the Special Rapporteur's position was that the draft articles as a whole applied only to unconditional clauses and clauses conditional on material reciprocity. However, in paragraph (2) of the commentary to article 14, it was stated that the rule proposed in that article applied to all most-favoured-nation clauses, whether they were of the unconditional type or took the form of a clause conditional on material reciprocity. He wondered whether, in the Special Rapporteur's opinion, the only conditional clauses envisaged were clauses conditional on material reciprocity or whether there could be others.

41. Mr. USHAKOV (Special Rapporteur) thought the rule stated in article 14 could apply to any condition of compensation and not only to conditions of material reciprocity, since it referred back to the rule stated in the corresponding article of the Vienna

<sup>9</sup> See 1483rd meeting, foot-note 2.

Convention regarding third States. No one could refuse to grant a right arising from a most-favoured-nation clause; that was why article 14 covered every possible application of the clause. That did not mean, however, that the draft articles dealt with conditional clauses in general. Rather, certain articles were of such a general nature that it was preferable to formulate the rule stated in them in very general terms which would apply not only to the situations expressly referred to, but also to every possible case of the application of the most-favoured-nation clause.

42. Mr. CALLE y CALLE said that the point raised by Mr. Verosta was very important, and particularly so in consideration of Mr. Riphagen's suggestion that the draft should deal only with unconditional clauses. It had been said that article 13 was concerned exclusively with such clauses, in other words, that there was no reason for the unconditionality of the clause to be affected by any other condition to which the treatment extended by the granting State to the third State might be made subject. Paragraph (2) of the commentary to article 14 stated that the rule proposed in the article applied to most-favoured-nation clauses whether they were of the unconditional type or took the form of a clause conditional upon material reciprocity. However, the Spanish version of "material reciprocity" which, according to the definition in article 2, meant "equivalent treatment". The French version however, spoke of "avantages réciproques" (reciprocal advantages). Obviously, the concept of reciprocal advantages was different from that of equivalent treatment. If the problem were simply one of translation, it had to be settled, since the Commission must decide whether it intended to use the precise concept of material reciprocity or the wider concept of reciprocal advantages.

43. The formulation of article 14 was perfectly clear. It indicated that the treatment extended by the granting State to a third State under an agreement limiting its application to relations between those States was irrelevant as far as the application of the most-favoured-nation clause was concerned. Any *clause réservée* was *res inter alios acta*, unless the beneficiary State in some way agreed to the restriction of the scope of the most-favoured-nation clause. Paragraph (1) of the commentary pointed out that the article clearly followed the general rule regarding third States set out in article 34 of the Vienna Convention, which specified that a treaty did not create either obligations or rights for a third State without its consent. Consequently, a treaty between the granting State and the third State did not create obligations, rights or restrictions on the operation of the clause between the granting State and the beneficiary State.

44. Sir Francis VALLAT said that article 14 expressed a perfectly acceptable idea, since no one would want to deny the principle of *res inter alios acta*. But it did not express the idea with sufficient precision. There was indeed a kind of contradiction between the title of the article, which spoke of the irrelevance of restrictions agreed between the granting and third States, and the article itself, which was cast

in the positive form as stated: "the beneficiary State is entitled to treatment...". In that respect, the article departed from the corresponding articles of the Vienna Convention on the Law of Treaties, which were cast in the negative form. Surely, "irrelevance" required the negative form.

45. It was interesting in that connexion to note how the Institute of International Law had dealt with a similar problem. The Institute had stated that the régime of unconditional equality established by the operation of an unconditional most-favoured-nation clause "cannot be affected by the contrary provisions of... conventions establishing relations with third States".<sup>10</sup> The underlying concept was that rights established under an unconditional clause were not affected by the provisions of other treaties to which the States concerned were not parties. It was a better formulation of the principle of *res inter alios acta* than that contained in article 14. He would be grateful if the Drafting Committee would accordingly review the presentation of article 14.

46. The CHAIRMAN, speaking as a member of the Commission, said that article 14 was indispensable. Like article 13, it dealt with the fundamental principle of the unconditionality of the clause, and more especially with the question of the *clause réservée*. In the past, certain learned writers had defended the idea that *clauses réservées* constituted exceptions to the application of the most-favoured-nation clause, and the Economic Committee of the League of Nations had been inclined to accept that view. Nevertheless, the previous Special Rapporteur, Mr. Ustor, had been right to discard a somewhat outdated concept and had included in what had originally been article 8 a saving clause stating: "unless the beneficiary State expressly consents to the restriction of its right in writing".<sup>11</sup> Later, the Commission had decided that a general principle was involved and that such a saving clause was not necessary.

47. Speaking as Chairman, he said that, if there were no further comments, he would take it that the Commission agreed to refer article 14 to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*<sup>12</sup>

ARTICLE 15 (Irrelevance of the fact that treatment is extended under a bilateral or a multilateral agreement)

48. The CHAIRMAN invited the Special Rapporteur to introduce article 15, which read:

**Article 15. Irrelevance of the fact that treatment is extended under a bilateral or a multilateral agreement**

The beneficiary State is entitled to treatment extended by the granting State to a third State whether or not such treatment is extended under a bilateral or a multilateral agreement.

<sup>10</sup> See *Yearbook... 1976*, vol. II (Part Two), p. 38, doc. A/31/10, chap. II, sect. C, art. 14, para. (2) of the commentary.

<sup>11</sup> *Yearbook... 1973*, vol. II, p. 108, doc. A/CN.4/266.

<sup>12</sup> For consideration of the text proposed by the Drafting Committee, see 1521st meeting, paras. 46 and 47.

49. Mr. USHAKOV (Special Rapporteur) said that treatment could be extended by the granting State to the third State with or without conditions, but it could also be extended in other ways, for example, under domestic legislation or by a unilateral decision or declaration of the granting State. Such examples implied a direct relationship between the granting State and the third State, which could be governed by a bilateral or a multilateral agreement. Article 15 provided that the fact that the treatment extended by the granting State to a third State was extended under a bilateral or a multilateral agreement had no effect on the application of the most-favoured-nation clause. It might then be asked what type of clause was involved. In fact, article 15 related to any kind of clause, whether it belonged to the conditional type, the unconditional type or any other type, and whether it was used in international trade, in matters relating to customs duties or in any other type of relations between States, such as consular and diplomatic relations, shipping rights or rights of access to the courts. The article covered all possible types of clauses.

50. In its commentary to article 15, the Commission had emphasized that the mere fact of favourable treatment was enough to set in motion the operation of the clause and that, unless the clause otherwise provided or the parties to the treaty otherwise agreed, the beneficiary of the clause was entitled to its benefits irrespective of whether the granting State had extended the favoured treatment to a third State by a bilateral or multilateral agreement or by a mere fact. It was possible to exclude bilateral or multilateral treaties from the scope of the clause, but, in order to do so, the clause or the treaty containing the clause had explicitly to provide for an exception for certain bilateral or multilateral treaties. A State could depart from the rule enunciated in article 15 by means of a special provision in the treaty containing the clause. Unless the treaty otherwise provided, the State that had extended favoured treatment to a third State was bound to extend the same treatment to the State benefiting from a most-favoured-nation clause.

51. The Commission had noted, however, that difficulties might arise in the case of certain multilateral agreements, particularly in the sphere of international trade. Indeed, some States would have difficulties in extending to the beneficiary State the same favours as those they had extended to other States under multilateral trade agreements. That was a question that had already arisen at the time of the League of Nations and had been considered by its Economic Committee. The Commission had been of the opinion that the only way of dealing with those difficulties was to include provisions to obviate them in the clauses themselves, but that it was impossible to lay down a rule that would cater for all situations. In its commentary, it had expanded on that idea by referring to the conclusions of the Economic Committee of the League of Nations and to the practice of States. In paragraph (23), for example, it had indicated that, in view of the considerations stated in the

preceding paragraphs, it had adopted article 15, which stated that the beneficiary State was entitled to treatment extended by the granting State to a third State, whether or not such treatment had been extended under a bilateral or a multilateral agreement.

52. In paragraphs (24) to (39) of its commentary to draft article 15, the Commission had dealt with the case of customs unions and similar associations of States and had considered the possibility of introducing a customs union exception. It appeared, however, that that was an issue entirely separate from those dealt with in article 15. Since article 15 related to all clauses and to all spheres of relations between States and not only to the sphere of economic and trade relations, it seemed premature to examine the question of possible customs union exceptions. He therefore proposed that the discussion of exceptions for customs unions and other similar associations of States should be postponed until the Commission came to consider the question of exceptions in general, in other words, until it discussed articles 20, 21 and 22. The question of customs union was not directly related to article 15.

*The meeting rose at 1 p.m.*

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## 1492nd MEETING

*Friday, 2 June 1978, at 10.05 a.m.*

*Chairman:* Mr. José SETTE CÂMARA

*Members present:* Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Diaz 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.

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### 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 15 (Irrelevance of the fact that treatment is extended under a bilateral or a multilateral agreement)<sup>1</sup> (*concluded*)

1. The CHAIRMAN said that at the previous meeting the Special Rapporteur had suggested that the case of customs unions should be left aside until the Commission came to discuss the question of exceptions

<sup>1</sup> For text, see 1491st meeting, para. 48.