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Summary record of the 1492nd meeting

Topic:
Most-favoured-nation clause

Extract from the Yearbook of the International Law Commission:-
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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.

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. 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 15 (Irrelevance of the fact that treatment is extended under a bilateral or a multilateral agreement)[1] (*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

[1] For text, see 1491st meeting, para. 48.

in general, which would be in connexion with articles 20, 21 and 22.

2. Mr. ŠAHOVIĆ stressed that the fact that the problems of multilateral agreements and customs unions were closely related would necessarily affect the formulation of article 15. Thus, although he could agree to the Special Rapporteur's suggestion, he had some reservations about it.

3. Mr. CALLE y CALLE said that, like Mr. Šahović, he found it difficult to comment on article 15 without referring to the customs union issue.

4. Article 15 was one of a group of articles that sought to ensure that the relationship between the beneficiary State and the granting State was not affected by the conditions or origin of the treatment granted to the third State. However it should be advisable to introduce into the wording of the article the idea of the treatment extended *de facto,* for in practice the treatment extended to the third State might be accorded under a unilateral decision or a legislative act, and not necessarily as a result of a bilateral or multilateral agreement. The case of a bilateral or multilateral agreement that restricted the benefits agreed upon would to some extent fall under the terms of article 14.[2] If the agreement specified the exclusion of States not parties thereto, it was typical of the case of systems of economic integration in which the treatment extended among members could not be granted to non-members.

5. The general rule was that a treaty did not create either obligations or rights for a third State without its consent; equally, a treaty could not abolish the pre-existing rights of a third State. If a new agreement conflicted in some way with earlier international agreements, the latter would have to be renegotiated or denounced, in order to avoid any difficulties for the contracting parties caused by a claim to most-favoured-nation treatment under an earlier commitment. Indeed, EEC had pointed out (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. C, 6, para. 2) that article 234 of the Treaty establishing EEC (Treaty of Rome)[3] prescribed that the rights and obligations resulting from conventions concluded prior to the entry into force of the Treaty between one or more States, on the one hand, and one or more third States, on the other hand, would not be affected by the provisions of the Treaty. In other words, provision was made for compatibility between the obligations created under a multilateral agreement and pre-existing commitments under agreements that extended most-favoured-nation treatment. Furthermore, in its ruling of 12 December 1972, the Court of Justice of the European Communities had stated that it was an established fact that, when concluding the treaty establishing EEC, the member States had been bound by their commitments under the General Agreement on Tariffs and Trade and could not, by means of an instrument concluded among themselves, escape their obligations towards third countries (*ibid.*).

6. In substance, the article was in keeping with the principle of *pacta sunt servanda,* and the rule it enunciated was set out correctly and clearly, although it would obviously be necessary to examine how States could, in the case of customs unions and similar associations, establish explicit exceptions to that rule.

7. Mr. REUTER thought the suggestion made by the Special Rapporteur and the Chairman that the discussion of certain difficult questions should be deferred until later was a reasonable one. He could support it, however, only on certain conditions. In fact, the Commission did not know whether it would have time to complete its work. The text of article 15 would be referred to the Drafting Committee, which might be able to adopt it rapidly, and then it would come back to the Commission; but it was to be feared that the Commission might not have time at the current session to deal with questions whose consideration had been deferred.

8. He would therefore make two proposals. The first was formal in nature and consisted of an amendment for the Drafting Committee. Article 15 should include a form of words indicating that its provisions were without prejudice to articles 21, 27 and, perhaps, a few others. The Drafting Committee should therefore insert in article 15 an explicit reference to those provisions in order to make it clear that the adoption of article 15 did not prejudge the issues with which they dealt.

9. The second proposal was in line with what Mr. Calle had just said. Article 15 took account of the fact that treatment could be extended under a bilateral or a multilateral agreement. But that was not enough, and the words "whatever the legal source of such treatment" should be added. The matter to which Mr. Calle y Calle had referred was probably what could, in technical customs terms, be called treatment extended autonomously or, in other words, by a unilateral act of the State. It might even be simply a practice. The wording of the article should therefore be made more general by indicating the variety of possible legal sources. It was not simply a matter of distinguishing between bilateral and multilateral agreements, for that would imply that reference was being made only to multilateral agreements, and it was precisely that which was unacceptable to many members of the Commission.

10. Mr. SUCHARITKUL, associated himself with Mr. Reuter's comments. Indeed, it could be asked why, in article 15, it was being sought to make a distinction between bilateral and multilateral agreements. Article 15 must be read in the light of article 6, which related to the legal basis of most-favoured-nation treatment. That article stated that:

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

In other words, treatment was extended regardless of its legal source, regardless of the type of legal obligation undertaken, and regardless of the number of contracting parties.

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

[3] United Nations, *Treaty Series,* vol. 298, p. 91.

11. Mr. SCHWEBEL also agreed with Mr. Reuter. Article 15 should be recast in order to broaden its terms and bring them into line with the commentary, which was not confined to bilateral or multilateral agreements and which stated: "The mere fact of favourable treatment is enough to set in motion the operation of the clause."[4] The article might be reworded to read:

> "The beneficiary State is entitled to treatment extended by the granting State to a third State whether such treatment is extended under a bilateral agreement, a multilateral agreement, or on any other basis."

12. Mr. TSURUOKA said that he would have no great difficulty in accepting the suggestion by the Special Rapporteur concerning the procedure to be followed. The Commission had taken account of the complexity of the question when it had adopted article 15 on first reading, and no new difficulties seemed to have arisen in the mean time.

13. He would nevertheless like to submit a drafting amendment relating only to the English text: it seemed wrong that the words "whether or not" should be followed a little further on in the same sentence by the word "or".

14. The word "agreement" was used in article 15. In his opinion, that term denoted not only an agreement concluded between States, but also an agreement concluded between a State and, for example, an international organization. If that interpretation was correct, it might be advisable to include an explanation of that point in the commentary.

15. Mr. JAGOTA said it was his impression from reading the commentary that the Commission was primarily concerned in article 15 with the application of the most-favoured-nation clause in the spheres of trade and commerce. However, the draft also dealt with the operation of the clause in other spheres. Even if that fact were taken into account, article 15 might well create difficulties for States unless they were especially careful in drafting the terms of most-favoured-nation clauses. For example, it was common nowadays to allow foreign nationals to enter a country without a visa, the aim being to facilitate the movement of persons and, more particularly, to promote tourism. The matter was regulated under bilateral treaties and, in the course of time, it might form the subject of multilateral treaties. Under article 15 in its current formulation, would an unconditional most-favoured-nation clause contained in an agreement automatically lead to the extension, in a case of that kind, of the benefits granted to the parties to a bilateral or multilateral agreement? If the rule set forth in article 15 were made a rule of general application, States would encounter difficulties because of what might be described as the "fictional" granting of most-favoured-nation treatment.

16. The Commission could enunciate the principle embodied in article 15 as a rule and then specify the exceptions thereto or, alternatively, it could delete article 15 altogether. If the article were deleted, certain questions would arise, such as the relationship between earlier and later treaties, especially multilateral treaties. It had been argued that if a party to a bilateral agreement which made provision for most-favoured-nation treatment later entered into a customs union, that party might escape the obligations imposed under the most-favoured-nation clause. But it had also been affirmed that it would be a case of successive treaties on the same subject-matter, to which the principle of *pacta sunt servanda* applied, and that State responsibiltiy might be entailed from a breach of the obligation under the clause. However, that was a separate matter that could be regulated under the law of treaties. On the other hand, if article 15 were retained as a general rule, so many exceptions would have to be provided for that little would be left of the rule itself. From the point of view of substance, article 15 was already covered to some extent by article 14, which referred to treatment extended "under an agreement limiting its application to relations between the granting State and the thir State.". In effect, article 15 simply elaborated on that point by specifying that the agreement might be bilateral or multilateral. State practice and other factors would be covered by article 6.

17. Consequently, he saw little harm at that stage in deleting article 15—or at least in setting it aside until the Commission came to consider the exceptions.

18. Mr. VEROSTA, referring to the use of the term "agreement" in article 15, said that, in his opinion, unless it was made clear that the agreement could take the form either of a bilateral or of a multilateral treaty, a definition of the word "agreement" would have to be included in article 2.

19. Sir Francis VALLAT said that it would be better to leave aside the discussion of what might be regarded as exceptions to article 15, although he had considerable doubt as to whether they would in fact constitute exceptions. The difficulty lay in the fact that article 15 was cast in the form of a positive entitlement to certain treatment, whereas the real aim of the article was to specify that a right that arose otherwise could not be taken away merely because the granting State entered into a treaty with a third State. If the article were drafted in the negative form, as would be appropriate in speaking of the irrelevance of a particular fact, many misgivings would be dispelled. The effect of an economic integration scheme, customs union or free-trade area would then clearly be quite a separate problem, as the Commission had by implication agreed that it should be.

20. Mr. USHAKOV (Special Rapporteur), replying to the question raised by Mr. Jagota, said that article 15 might have begun with the words "unless the clause or the treaty containing the clause otherwise provides". The Commission had already discussed that

[4] *Yearbook... 1976*, vol. II, p. 39, doc. A/31/10, chap. II, sect. C, art. 15, para. (1) of the commentary.

question, but, after drafting article 26, it had decided to delete those words, since in practice it was difficult to include them in every article in order to indicate that States could depart from the rules stated in the article.

21. It had been asked whether there was a link between article 6 and article 15; the answer was that there was not. Article 6 related to the legal basis of most-favoured-nation treatment, while article 15 concerned the relationship between the granting State and the third State. The Commission had wanted to include that article because the question whether it dealt with bilateral or multilateral agreements between the granting State and the third State had sometimes given rise to difficulties, to which the Commission had referred in its commentary. It did not necessarily mean treaty relations in the broad sense of the term; it could also mean, for example, a unilateral act of the granting State. In order to avoid difficulties of interpretation, it would of course be possible, as Mr. Schwebel had suggested, to add the words "or on any other basis".

22. It had been proposed that the draft should include a definition of the term "agreement", but in the draft articles under consideration the Commission was not dealing with the law of treaties as such. Moreover, any definition required the use of clear terms, and a definition of the term "agreement" might lead to a whole series of other definitions.

23. He still maintained that exceptions relating to economic relations, customs unions or other similar associations of States had nothing to do with article 15 as such, for that article dealt with the right to most-favoured-nation treatment provided for in a conditional or unconditional clause contained in a bilateral or multilateral agreement and extended in any field whatever—diplomatic relations, shipping and so on. The words "bilateral agreement" and "multilateral agreement" meant any oral or written agreement concluded between States or with the participation of other subjects of international law. Such agreements might have been concluded under treaty law or under customary law, and were not only agreements establishing economic associations of States. In his report, he had indicated that agreements establishing economic associations could not be regarded as simple agreements, for they also involved other elements.

24. It would be possible to cast article 15 in the negative form, although it was clear as it stood. It would also be possible, in order to expand the scope of the article, to add the words "under other international obligations". The Drafting Committee might deal with that problem.

25. It was for the Commission to decide whether it wanted to refer article 15 to the Drafting Committee forthwith or only after it had studied the question of exceptions. He was, however, convinced that article 15 in no way affected possible exceptions in the sphere of economic relations, customs unions or other similar associations of States.

26. Sir Francis VALLAT said that, in view of the helpful comments by the Special Rapporteur, it might be appropriate to give a clearer indication of what he had meant by an article drafted in the negative form. At the same time, it should be noted that article 15 prescribed that the beneficiary State was "entitled to treatment extended...", whereas it was more accurate in the context of the most-favoured-nation clause to say that the beneficiary State was "entitled to treatment not less favourable than that extended...", which was not same thing. The article should perhaps read:

> "The right of a beneficiary State under a most-favoured-nation clause to treatment not less favourable than that extended by the granting State to a third State is not affected by the mere fact that such treatment is extended to the third State under a bilateral or multilateral agreement."

The word "agreement" might be placed in square brackets, pending a decision on the point raised by Mr. Verosta. Such a form of words would remove some of the anxiety regarding the question of economic integration schemes and other conditions, and it would also meet another aim, namely, to do away with the old argument that the conclusion of another treaty might provide an excuse for a State to escape from its obligations under a most-favoured-nation clause.

27. Aster a brief procedural discussion in which, Mr. VEROSTA, Mr. RIPHAGEN and Mr. FRANCIS took part, the CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refere article 15 to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[5]

ARTICLE 16 (Right to national treatment under a most-favoured-nation clause)

28. The CHAIRMAN invited the Special Rapporteur to introduce article 16, which read:

Article 16. Right to national treatment under a most-favoured-nation clause

The beneficiary State is entitled to treatment extended by the granting State to a third State whether or not such treatment is extended as national treatment.

29. Mr. USHAKOV (Special Rapporteur) said that article 16 concerned the scope of the most-favoured-nation clause. If the granting State extended national treatment to a third State, the beneficiary State acquired the right to the same treatment. Article 16 thus dealt with any treament that might be extended to the third State. In its commentary, the Commission had stated: "This rule seems to be at first sight self-evident."[6] It had shown that the practice of

[5] For consideration of the text proposed by the Drafting Committee, see 1521st meeting, paras. 46 and 47.

[6] *Yearbook... 1976*, vol. II (Part Two), p. 48, doc. A/31/10, chap. II, sect. C, art. 16, para. (1) of the commentary.

States confirmed that view and had given examples of the interpretation of that effect of the most-favoured-nation clause by the courts of various countries. In paragraph (7), it had nevertheless referred to one writer's dissenting opinion. Basing its views on the practice of States, the Commission had stated that it had no reason to depart form the conclusion that followed from the ordinary meaning of the clause, which assimilated the beneficiary to the most-favoured nation. The clause was very useful for negotiators of treaties because, if they wished to exclude national treatment, they had to stipulate that fact either in the clause itself or in the treaty containing the clause concluded between the granting State and the beneficiary State. In 1975, in order to indicate the residual character of the article, the Commission had included the following phrase in square brackets at the beginning of the text of article 16: "unless the treaty otherwise provides or it is otherwise agreed"; but in 1976, it had considered that, with the inclusion of article 26 in the draft, it was no longer necessary or appropriate to include those introductory words and it had therefore decided to delete them.[7]

30. Some representatives speaking on that subject in the Sixth Committee of the General Assembly at its thirty-first session, held in 1976, had supported in general the provisions of article 16. Others had, however, expressed reservations. They had noted that the title and text of the article did not seem to be completely in harmony and had, in particular, raised the question of the definition of the term "national treatment" (A/CN.4/309 and Add.1 and 2, para. 230). It would be for the Drafting Committee to deal with the question of the title. It would, of course, be possible to give a definiton of "national treatment", but that did not seem essential, since the term was used only in articles 16 and 17. The previous Special Rapporteur, Mr. Ustor, had suggested expanding the scope of the draft and including in it certain articles relating to national treatment, since it was a question that was rather closely related to the question of most-favoured-nation treatment. After a lengthy discussion, however, the Commission had decided not to include in the draft any articles relating to national treatment. The definition proposed by the previous Special Rapporteur could, of course, be used again, but the best solution would probably be to give some thought to the problem and consider it at the same time as draft article 2.

31. The Government of Luxembourg had expressed the view that, given the difference in nature between national treatment and most-favoured-nation treatment, it would be preferable not to confuse those two types of questions and accordingly to delete articles 16 and 17 (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. A). However, if those articles were deleted, the question whether the beneficiary State was entitled to the treatment extended by the granting State to the third State as national treatment would still remain unanswered. Moreover, the commentary to article 16 clearly showed that the practice of States in interpreting the clause was in fact that indicated in article 16. Article 16 was in fact a modification of existing practice and of the customary rules recognized by practically all States. It would therefore be preferable to retain articles 16 and 17, subject to any drafting improvements.

32. In the opinion of the Government of Guyana, the Commission had, in article 16, sought to assimilate the standard of national treatment to the standard of most-favoured-nation treatment, but in the formulation of the article it had failed to take account of the concerns to which all countries had attached great importance for a number of years. The Government of Guyana therefore considered that it would be beneficial to the development of the new law of international economic relations if that article reflected those concerns (*ibid.*).

33. There had also been a written comment by EEC that article 16 would imply that the mutual non-discriminatory commitments granted to each other by States members of a customs union should be extended to third countries (*ibid.*, sect. C, 6, para. 8). He must admit that he did not understand the meaning of that comment. In particular, he did not see how the provisions of article 16 would affect the mutual non-discriminatory commitments of the members of an economic union.

34. The situation seemed to be clear enough. State practice and the generally recognized rules of customary law proved that, from the point of view of international relations among States, article 16 reflected the existing legal situation. The article should therefore be retained, subject to any drafting amendments.

35. Mr. FRANCIS said that he had no difficulty with article 16. It was perfectly clear and afforded yet another example of the great care that was required in negotiating the terms of most-favoured-nation clauses.

36. Mr. DADZIE said that article 16 was acceptable as it stood, provided that article 26 was adopted; otherwise, some drafting changes might be needed.

37. Mr. NJENGA said that article 16 presented no difficulty, subject of course to the exceptions to be provided for, particularly in respect of frontier traffic, which was referred to in article 22. With regard to the drafting, it might be better to replace the words "whether or not", in the English version, by the words "even if". A more neutral formulation of that kind would avoid the implication that national treatment was better than most-favoured-nation treatment, which was not necessarily true.

38. Mr. JAGOTA said a distinction had long been made between most-favoured-nation treatment and national treatment, the distinction being that the latter was generally, although not invariably, much more favourable than the former.

39. Treatment of aliens and the property of aliens could be classified under four headings: treatment on

[7] *Ibid.*, p. 49, para. (9) of the commentary.

the basis of equality, whereby any person not a national of a particular country was treated on the same footing as any other alien; treatment akin to most-favoured-nation treatment, whereby, if certain benefits were accorded to some aliens, those benefits would be accorded to a beneficiary under the most-favoured-nation clause; preferential treatment, which was normally more advantageous than most-favoured-nation treatment; and treatment equivalent to national treatment. It was within that framework that State practice was normally conducted.

40. India, for instance, had a special arrangement with Nepal for national treatment under which citizens of both countries enjoyed freedom of movement, without the need for passports or visas, and a number of trade benefits. Normally, India would not accord national treatment to any other country under a most-favoured-nation clause unless the clause so stipulated; indeed, he knew of no such case.

41. In its comments (*ibid.*, paras. 3 and 4), EEC also made a distinction between treatment under the most-favoured-nation clause and preferential treatment. It referred to EEC practice in the matter, particularly in relation to signatories of the Lomé Convention (the ACP countries), and stated that, under the Convention, the ACP countries were required to accord most-favoured-nation treatment only. In considering treatment in State practice, therefore, it was necessary to take account of all such distinctions and their varying correlations.

42. Article 16 was couched in general terms, but its effect was that any treatment, including national treatment, extended by a granting State to a third State would be accorded to the beneficiary of a most-favoured-nation clause unless, as was clear from paragraph (8) of the commentary, the clause or treaty stated otherwise. In other words, the clause would apply automatically to national treatment unless expressly excluded. He could accept article 16 on that basis, provided it was recognized that the onus would be on those negotiating a most-favoured-nation clause to ensure that it did or did not cover national treatment.

43. Mr. TSURUOKA suggested that the words "in so far as such treatment relates to the same subject-matter" should be added at the end of article 16, and that the title of the article should read: "Irrelevance of the fact that treatment is extended as national treatment". The clarification afforded by the addition of the words he had porposed was self-evident, but it might be helpful and did not burden the text. With regard to the title, it was necessary to avoid giving the impression that the Commission was dealing with a matter of internal law, as the existing title might suggest. In fact, the reference was to national treatment only within the framework of the application of the most-favoured-nation clause.

44. The CHAIRMAN, speaking as a member of the Commission, said that State practice over the centuries had demontrated the relationship between the most-favoured-nation clause and the national treatment clause. They often appeared together in treaties and the purpose of both was to achieve equality of treatment. They differed, however, in that, whereas one referred to treatment of persons and things pertaining to the State, the other referred to treatment of persons and things belonging to the national legal order of the State. The former Special Rapporteur for the topic, Mr. Ustor, in a felicitous turn of phrase, had referred to national treatment as "inland parity" and most-favoured-nation treatment as "foreign parity",[8] while Mr. Reuter had described a most-favoured-nation clause as "a *renvoi* to another treaty" and a national treatment clause as "a *renvoi* to municipal law".[9] The national treatment clause, traditionally concerned with the treatment of aliens in the national territory, had since found wide application in trade and, as embodied in article III, paragraph 4, of the General Agreement on Tariffs and Trade,[10] constituted, together with the most-favoured-nation clause, one of the main pillars of the GATT system.

45. Those facts were reflected in article 16, which should be retained and referred to the Drafting Committee.

46. Mr. USHAKOV (Special Rapporteur), replying to Mr. Jagota's comments, said that the rule stated in article 16 reflected State practice. Some States, such as India, had so far followed a different practice, but that practice would be safeguarded by article 25 relating to the non-retroactivity of the articles of the draft. It was to be hoped that, in future, those States would follow the majority practice.

47. He also wished to differentiate national treatment, which existed as such, from most-favoured-nation treatment, which existed only if the granting State extended a certain treatment to a third State.

48. Mr. Tsuruoka's suggestion for the addition of a phrase at the end of article 16 did not appear to him to be acceptable. If the proposed clarifications were included in article 16, there would be no reason for not including other clarifications that might be necessary as a result of earlier or later articles.

49. Nor should it be emphasized that national treatment constituted the most favourable treatment. Indeed, article 17 was based on the presumption that national treatment was not always the most favourable. That was why the beneficiary State could choose in each case the treatment it preferred.

50. Furthermore, it could happen that national treatment applied automatically to all aliens, as was the case in the Soviet Union. In that case, it was enough to refer to the constitution, whether a most-favoured-nation clause existed or not. If internal law did not provide for national treatment, the rule stated in article 16 would apply. The article was thus logical; in addition, it reflected the general practice of States.

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[8] *Yearbook... 1974*, vol. II (Part One), p. 125, doc. A/CN.4/280, arts. 9 and 10, para. (11) of the commentary.

[9] *Yearbook... 1964*, vol. I, p. 113, 741st meeting, para. 14.

[10] GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No. GATT/1969-1).

51. The CHAIRMAN suggested that article 16 be referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[11]

ARTICLE 17 (Most-favoured-nation treatment and national or other treatment with respect to the same subject-matter)

52. The CHAIRMAN invited the Special Rapporteur to introduce article 17, which read:

Article 17. Most-favoured-nation treatment and national or other treatment with respect to the same subject-matter

If a granting State has undertaken by treaty to accord to a beneficiary State most-favoured-nation treatment and national or other treatment with respect to the same subject-matter, the beneficiary State shall be entitled to whichever treatment it prefers in any particular case.

53. Mr. USHAKOV (Special Rapporteur) said that article 17 applied to the case in which several types of treatment with respect to the same subject-matter were extended to the beneficiary State, which was then entitled to the treatment it preferred in each particular case. Thus, in addition to the treatment it could claim under a most-favoured-nation clause, the beneficiary State might, with respect to a certain subject-matter, also be able to benefit from national treatment or some direct treatment other than national treatment. In the commentary to article 17, the Commission had given a number of examples. When such a choice existed, the beneficiary State logically chose the most favourable treatment, but, from the legal standpoint, it was free to choose the treatment it preferred.

54. In the Sixth Committee, some representatives had stated that article 17 was based on the assumption that national and most-favoured-nation treatment went beyond the beneficiary State's entitlement under the international minimum standard (A/CN.4/309 and Add.1 and 2, para. 242).

55. In its written comments, the Government of Luxembourg had proposed the deletion of both article 16 and article 17 (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. A), while the Government of the Netherlands had stated that the Commission should not deal further in the draft with the problems connected with the coexistence of most-favoured-nation clauses and national treatment clauses (*ibid.*). He noted that the Commission itself had considered it unnecessary and impossible to go more deeply into those problems.

56. Mr. JAGOTA said that, as worded, article 17 did not follow on logically from article 16, as was the intention. The first part of article 17 provided that the granting State would undertake by treaty to accord to a beneficiary State most-favoured-nation and national or other treatment. That was not in fact the case. The only clause that operated as between the granting State and the beneficiary State was the most-favoured-nation clause. Relations between the granting State and the third State, on the other hand, might be based on most-favoured-nation, national or other treatment, the choice of such treatment resting with the beneficiary State. He would therefore suggest that the words "and national or other treatment with respect to the same subject-matter" be replaced by the words "and the treatment extended by a granting State to a third State is most-favoured-nation treatment or national or other treatment with respect to the same subject-matter". It was purely a drafting point that could perhaps be referred to the Drafting Committee.

57. Mr. TABIBI said he would have no objection if the Drafting Committee wished to consider Mr. Jagota's amendment, but considered that article 17 was acceptable as it stood and should be retained. It was clear in its intent, that in any direct arrangment between two parties it was for the granting State to decide what type of treatment should be accorded to the beneficiary State, the latter having no say in the matter.

58. Mr. CALLE y CALLE said that, while articles 16 and 17 both dealt with national treatment, they differed in purpose. The former was designed to protect the beneficiary State from the possibility of national treatment being accorded to a third State, while the latter vested in the beneficiary State an additional right, namely, the right to choose the form of treatment most advantageous to it.

59. He noted that Luxembourg, in its comments (*ibid.*), had proposed the deletion of articles 16 and 17 on the ground that national treatment and most-favoured-nation treatment differed in nature, national treatment being determined by internal law. He also noted that EEC, in its comment, had proposed a new article 16 *bis* (*ibid.*, sect. C, 6, para. 11) relating to certain entities where there was generally inland parity amont the members. He would suggest that the Drafting Committee give some thought to the case for excluding national treatment extended within the framework of such entities.

60. Mr. USHAKOV (Special Rapporteur) wished to stress once again the fact that, in the situation referred to in article 17, the beneficiary State could choose between most-favoured-nation treatment, national treatment and treatment that was extended directly and that was even more generous than the two other types of treatment. Thus, the beneficiary State's products could benefit from most-favoured-nation treatment, from national treatment and from direct treatment which might, for example, exampt them from all customs duties. In such a case, the beneficiary State could choose the treatment it preferred. It was to be noted that most-favoured-nation treatment was extended by treaty, that national treatment might depend on internal law and that direct treatment could be the result of a written or oral treaty. It went without saying that States were free to introduce all kinds of exceptions in the most-favoured-nation clause, including exceptions for cus-

[11] For consideration of the text proposed by the Drafting Committee, see 1521st meeting, paras. 46 and 47.

toms unions. In the absence of such exceptions, however, it was the general rule stated in article 17 that applied.

61. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 17 to the Drafting Committee for consideration in the light of the discussion and of the amendments which had been proposed.

It was so agreed.[12]

The meeting rose at 1 p.m.

[12] *Ibid.*, paras. 48 and 49.

1493rd MEETING

Monday, 5 June 1978, at 3.5 p.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, 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 18 (Commencement of enjoyment of rights under a most-favoured-nation clause)

1. The CHAIRMAN invited the Special Rapporteur to introduce article 18, which read:

Article 18. Commencement of enjoyment of rights under a most-favoured-nation clause

1. The right of the beneficiary State to any treatment under a most-favoured-nation clause not made subject to the condition of material reciprocity arises at the time when the relevant treatment is extended by the granting State to a third State.

2. The right of the beneficiary State to any treatment under a most-favoured-nation clause made subject to the condition of material reciprocity arises at the time of the communication by the beneficiary State to the granting State of its consent to accord material reciprocity in respect of the treatment in question.

2. Mr. USHAKOV (Special Rapporteur) noted, first, that article 18 had elicited comments from only two governments: the Government of Luxembourg, which had expressed reservations with regard to the concept of material reciprocity (A/CN.4/308 and Add.1 and Add.1/Corr.1, section A), and the Government of the Netherlands, which had reiterated its reservations concerning article 5 (*ibid.*).

3. Article 18, which specified the time of the commencement of enjoyment of rights under the most-favoured-nation clause, was related to articles 9 and 10.[1] As the Commission had explained in the commentary to article 18, paragraph 1 of that article applied to unconditional most-favoured-nation clauses, while paragraph 2 dealt with clauses made subject to a condition of reciprocity. In order to take account of the distinction recently made by the Commission between a condition of material reciprocity and another condition of compensation, the wording of article 18 would have to be suitably amended.

4. Both article 9 and article 18, paragraph 1, dealt with unconditional most-favoured-nation clauses. Article 9 provided that the beneficiary State acquired "the right to most-favoured-nation treatment without the obligation to accord material reciprocity to the granting State"; article 18 specified the time at which that right arose, namely, "at the time when the relevant treatment is extended by the granting State to a third State". The Drafting Committee should perhaps state exactly when treatment could be regarded as having been "extended". Must such treatment have been extended *de jure* or *de facto*? It would appear that it must have been extended *de jure*. If the granting State had pledged favours to a third State, it mattered little to the beneficiary State whether the pledge had been carried out or not. The pledge gave rise to an obligation for the granting State and it was at that point that the right of the beneficiary State to receive the treatment pledged to the third State arose. The granting State might also have enacted domestic legislation with a view to granting certain favours to a third State, but those favours might not have been immediately accorded. In those circumstances, did the right of the beneficiary State arise once the legislation was adopted, or once the treatment in question was effectively extended to the third State? Although State and international organizations had not raised that question in their comments, the Drafting Committee should endeavour to resolve it.

5. The Drafting Committee should also try to ensure consistency in the wording of paragraphs 1 and 2 of article 18. According to paragraph 1, relating to unconditional clauses, the right of the beneficiary State arose when the relevant treatment was extended by the granting State to a third State. According to paragraph 2, relating to clauses made subject to the condition of material reciprocity, that right arose "at the time of the communication by the beneficiary State to the granting State of its consent to accord material reciprocity in repsect of the treatment in question". Paragraph 2 did not specify whether the treatment must have been extended by the granting State to the third State; that condition, which was contained in paragraph 1, was not repeated in paragraph 2. Possibly the condition was to be assumed,

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