Document:-
A/CN.4/SR.1493

Summary record of the 1493rd meeting

Topic:
Most-favoured-nation clause

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

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.

although the word "also", which appeared in article 19, paragraph 2, did not occur in article 18, paragraph 2.

6. Reverting to the suggestion of Mr. Tsuruoka and Mr. Sucharitkul for the addition of a second paragraph to article 10 or the drafting of an article 10 *bis* concerning conditional clauses other than clauses made subject to a condition of material reciprocity,[2] he stressed that there was an infinite variety of clause of the latter type and that it would be virtually impossible to specify, in article 18, at what point the right of the beneficiary State arose under every conceivable type of conditional clause.

7. In general, the idea in article 18 was clear. Subject to drafting improvements, the article should therefore be acceptable.

8. Mr. DADZIE said he had no difficulty with the substance of article 18. He thought, however, that paragraph 1 should be reworded so that it would be quite clear to the reader that the word "extended" must be understood to mean extended *de jure* rather than *de facto*. Moreover, the assumption underlying the rule in paragraph 2, namely, that the treatment had been extended by the granting State to a third State, should be expressly stated. Both those points could probably be referred to the Drafting Committee for consideration.

9. Mr. TABIBI supported article 18 in principle and was in favour of referring the existing text to the Drafting Committee. He noted, however, that paragraph 1 differed entirely from paragraph 2 in regard to the elements that gave rise to the beneficiary State's right; in particular, paragraph 2 introduced an element of reciprocity which did not appear in paragraph 1. Moreover, article 7 (The source and scope of most-favoured-nation treatment) was more closely related to paragraph 1 of article 18 than to paragraph 2. The same comments applied *mutatis mutandis* to article 19 (Termination or suspension of enjoyment of rights under a most-favoured-nation clause). He therefore suggested that the Special Rapporteur should consider whether paragraphs 1 and 2 of article 18 should not form two separate articles.

10. Mr. REUTER considered that the points mentioned by the Special Rapporteur were very pertinent; indeed, in addition to the drafting aspects, they raised some real problems of substance. For instance, the term "conféré", in the French text of paragraph 1 of article 18, had a specific legal meaning in French, whereas the term "extended", in the English version, referred more to a *de facto* situation. True, the right of the beneficiary State to certain treatment had a legal source, as was apparent from article 7, but the question arose whether that legal title required to be backed by a *de facto* situation. The Commission had already pointed out that a treatment could be extended not only by virtue of a bilateral or a multilateral agreement, but also by virtue of a unilateral legal act or even of a practice. Was it then necessary that, in addition to being established, the legal title should be given material effect? The Special Rapporteur had seen the consequences that that problem could have on the date from which the beneficiary State was entitled to the relevant treatment.

11. There were yet other aspects to the problem. One was the harmonization of articles 18 and 19. Moreover, the question arose, in connexion with article 19, as to the consequences of the concept of suspension introduced in that article. When a right was accorded under a bilateral treaty, for example, and the treaty was suspended, that right continued to exist; what ceased to exist was the according of the relevant treatment. Suspension of a treaty might occur for a number of reasons. For example, under article 60 of the Vienna Convention on the Law of Treaties,[3] a treaty might be suspended if its provisions were violated. If it were assumed that the treatment must in fact have been extended, the rights of the beneficiary State would be suspended when the treaty was suspended. But that was not so evident if reference were made only to the legal title and not to the actual extension of the treatment. For example, a State might be subjected to international sanctions, with the result that certain economic advantages were suspended. Legally, those advantages continued to exist; they were still accorded, but they were not in fact extended. If the decisive factor were taken to be the actual extension of the advantages, then all the States benefiting from a most-favoured-nation clause would suffer the consequences. The Commission had therefore to decide whether to require, as a condition, the actual extension of the treatment, or whether to require only the existence of a legal title thereto.

12. Mr. SUCHARITKUL thought that article 18 as such did not raise any great difficulties, but that it posed a problem in relation to articles 16 and 17, dealing respectively with the right to national treatment under a most-favoured-nation clause and the choice between that treatment and another treatment with respect to the same subject-matter. If the granting State extended to a third State a treatment less favourable than national treatment, a State that was entitled to national treatment under a most-favoured-nation clause would choose national treatment. If the granting State subsequently extended to the third State treatment more favourable than national treatment, could the beneficiary State go back on its choice? That problem arose not only in regard to paragraph 1 of article 18, but also in regard to the condition of material reciprocity referred to in paragraph 2. Moreover, if reference were made to article 19, on the termination or suspension of enjoyment of rights udner a most-favoured-nation clause, it would be seen that there was probably a link between that provision and the choice that the beneficiary State could make in accordance with article 17.

[2] See 1490th meeting, paras. 6 and 14.

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

13. Mr. El-ERIAN pointed out that, under article 18, paragraph 2, the commencement of the beneficiary State's right was in effect made subject to a condition precedent, in the same way as, under article 19, the termination of that right was made subject to a condition subsequent. He therefore suggested that the said paragraph 2 should be reworded, in terms as simple as those used in paragraph 1, to provide that, where the right of the beneficiary State was made subject to a condition, it arose at the time when that condition was fulfilled. He saw no need for the more elaborate formulation used in the existing text.

14. Mr. RIPHAGEN thought that the word "treatment" in fact had three possible meanings: *de facto* treatment; treatment under national law; treatment under international law.

15. He noted a certain contradiction between article 18, paragraph 2, and article 19, paragraph 2, on the one hand, and article 10 (Effect of a most-favoured-nation clause conditional on material reciprocity), on the other. Article 10 provided that the beneficiary State acquired the right to most-favoured-nation treatment "only upon according" material reciprocity to the granting State; and according to paragraph (*e*) of article 2 (Use of terms), material reciprocity meant "equivalent treatment". That was susceptible of two interpretations: the equivalent treatment could be accorded either *de jure* or *de facto*.

16. However, neither of those interpretations was valid under article 18, paragraph 2, or article 19, paragraph 2, since the condition to be met was the communication by the beneficiary State to the granting State of its consent to accord material reciprocity. Such a communication presumably gave rise to an international obligation, but that did not mean that the obligation would be performed under national legislation or by *de facto* treatment. The Drafting Committee could usefully examine that point with a view to restoring the balance between the rights and obligations of the parties under the clause.

17. With regard to the suspension or termination of the beneficiary State's right as a sacntion for the breach of a treaty by a third State, it might appear unjustified at first sight to provide that such a breach had a prejudicial effect on the beneficiary State under a most-favoured-nation clause. However, if suspension or termination by the granting State of the treatment extended to a third State were without effect on the application of the most-favoured-nation clause to the beneficiary State, that would be tantamount to attaching importance to a relationship between the granting State and third States that had been considered irrelevant in other respects. It also showed a certain lack of balance between the right and obligations under the clause, a matter that should perhaps be considered by the Drafting Committee. He would be inclined to think that the date on which the right to most-favoured-nation treatment arose and the time when the condition of material reciprocity was considered to be fulfilled were questions of *de facto* rather than of *de jure* treatment.

18. Sir Francis VALLAT recalled that, when the terms "accord" and "extend" had been considered by the Drafting Committee in 1975, the intention had been to use the former term to refer to treaty obligations arising mainly on the part of a granting State to a beneficiary State, and the latter to the actual extension of treatment, usually to a third State.[4] That distinction was implicit in the wording of article 5 (Most-favoured-nation treatment). Article 10 (Effect of a most-favoured-nation clause conditional on material reciprocity), however, had caused some difficulty, because it dealt with the reverse situation, in which material reciprocity was given by the beneficiary State to the granting State. In that article the word "according" had been used, although, in his view, the Commission should now consider the possibility of using that term only for treatment accorded by a granting State to a beneficiary State. He believed that it was the use of the word "according", in article 10, that had led the Commission into error in the case of article 18, and possibly of article 19. The reference in article 18, paragraph 2, to the communication by the beneficiary State to the granting State of its consent to accord material reciprocity, was a departure from the essence of the matter. What was really at issue was whether or not the beneficiary State in fact gave material reciprocity to the granting State.

19. In view of the importance of the point, he would suggest that the Drafting Committee reconsider the use of the terms "accord" and "extend" throughout the draft.

20. Mr. TSURUOKA proposed that article 18 be reworded to read:

> "*Article 18. Commencement of right to claim treatment under a most-favoured-nation clause*
>
> "1. The beneficiary State is entitled to claim, under a most-favoured-nation clause not made subject to conditions, any treatment extended by the granting State to a third State from the time when the relevant treatment is extended either in fact or in law by the granting State to the third State.
>
> "2. The beneficiary State is entitled to claim, under a most-favoured-nation clause subject to the condition of material reciprocity, any treatment extended by the granting State to a third State from the time when the beneficiary State consents to accord material reciprocity to the granting State in respect of the treatment in question.
>
> "3. The beneficiary State is entitled to claim, under a most-favoured-nation clause subject to conditions other than the condition of material reciprocity, any treatment extended by the granting State to a third State from the time when (*a*) the relevant treatment is extended either in fact or in law by the granting State to the third State and (*b*) the above conditions are fulfilled."

[4] See *Yearbook... 1975*, vol. I, p. 254, 1352nd meeting, para. 4.

21. As it was now worded, article 18 might give the impression that the treatment was extended by the granting State to the third State only when the granting State actually accorded it to the third State. However, under article 7, the right of the beneficiary State had its source in the most-favoured-nation clause. In article 18, therefore, account should be taken of the principle that the right of the beneficiary State derived from the most-favoured-nation clause in force between that State and the granting State.

22. In the proposed amendment, the words "at the time" were replaced by the words "from the time", since article 18 referred to the time from which the beneficiary State began to enjoy its rights, rather than to a particular moment.

23. The words "either in fact or in law" were added in paragraphs 1 and 3 in order to emphasize that the relations between the granting State and the third State were independent of the relations between the granting State and the beneficiary State; the latter could claim the treatment extended to the third State from the time when that treatment was extended either in fact or in law. Where there was a condition of material reciprocity, the beneficiary State could claim the treatment in question from the time when it consented to accord material reciprocity. It was not the time when its consent was communicated that should be taken into consideration. Normally, such consent was expressed by an exchange of letters or by an administrative agreement. Moreover, the mere fact that the beneficiary State had communicated its consent to the granting State did not mean that it had actually accorded that State material reciprocity.

24. The proposed new paragraph dealt with the case of a clause subject to a condition other than that of material reciprocity. He was less pessimistic than the Special Rapporteur and thought that the Commission might very well cover that case, provided it did not venture into the sphere of primary rules.

25. Mr. USHAKOV (Special Rapporteur) observed that the existing wording of article 18 did not specify the time when treatment was "extended". He therefore proposed that paragraph 1 of the article should be worded along the following lines:

> "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 obligation of the granting State to extend the relevant treatment to a third State itself arises."

26. The most-favoured-nation clause produced its effects at the time when the granting State undertook to accord a certain treatment to a third State. It mattered little if the treaty between the granting State and the third State providing for that obligation were not performed; the obligation of the granting State might also arise from an act of internal legislation: the beneficiary State might then claim all the advantages that the granting State had extended to third States under its internal law, even if those States did not yet enjoy the advantages in question. The right of the beneficiary State against the granting State arose with the creation of the obligation of the granting State to the third State, whether that obligation had its source in a treaty, in internal law or in custom. The decisive factor was the obligation of the granting State to the third State, whether that obligation had been performed or not, and there was no need to take into consideration the very hypothetical case of a practice.

27. In the case covered by paragraph 2 of article 18, the right of the beneficiary State arose when that State communicated to the granting State its consent to accord material reciprocity; hence account must be taken of the legal act constituted by the communication of consent. Assuming the existence, for example, of a clause subject to a condition of material reciprocity and relating to immunities to be accorded to consulates, the beneficiary State, on condition that it accorded the same treatment as a third State had accorded to the granting State, might receive from the granting State the treatment that the latter had extended to the third State. However, the beneficiary State might be unable to accord the privileges in question to the consulates of the granting State in its own territory—for example, because no consulate had yet been opened. Hence it was necessary to keep to the communication by the beneficiary State of its consent to accord material reciprocity. Nevertheless, the creation of the obligation of the granting State to the third State might well be made an additional condition.

28. Sir Francis VALLAT said that the Special Rapporteur had raised a new point that should be approached with some caution, for there was a risk of laying down a general interpretation of clauses that were not actually before the Commission. Whether or not a most-favoured-nation clause required that corresponding treatment be extended to a third State, and the point at which an obligation to extend such treatment came into being and thereby brought the most-favoured-nation clause into operation, depended on the wording of the clause. Usually, such clauses were drafted to provide that it was the extension of treatment itself that brought the clause into operation. To depart from that idea, and to envisage the possibility of an obligation to extend treatment to a third State, would be to import a new element into most-favoured-nation clauses; that, in his view, would be a very dangerous approach. As long as the Commission confined itself to the question of extension of treatment, it would be on fairly firm ground.

29. Mr. USHAKOV (Special Rapporteur) replied that the Commission's task was to draft a rule applicable to clauses that contained no special provisions. Where there were special provisions, article 26 would apply. All the articles of the draft were subject to article 26, under which the parties were free to agree on different provisions. In the case of conditions other than the condition of material reciprocity, and with respect to the time at which the rights of the beneficiary State arose, the Commission could draft only a vague provision of no value. Hence it was neces-

sary to refer to specific conditions as determining the time when those rights arose.

30. In conclusion, he expressed the hope that the Drafting Committee would be able to put article 18 into satisfactory form in the light of the comments and suggestions made during the discussion.

31. The CHAIRMAN suggested that article 18 should be referred to the Drafting Committee.

It was so agreed.[5]

ARTICLE 19 (Termination or suspension of enjoyment of rights under a most-favoured-nation clause)

32. The CHAIRMAN invited the Special Rapporteur to introduce article 19, which read:

Article 19. Termination or suspension 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 is terminated or suspended at the time when the extension of the relevant treatment by the granting State is terminated or suspended.

2. The right of the beneficiary State to any treatment under a most-favoured-nation clause made subject to the condition of material reciprocity is also terminated or suspended at the time when the termination or suspension of the material reciprocity in question is communicated by the beneficiary State to the granting State.

33. Mr. USHAKOV (Special Rapporteur) said that article 19 was closely connected with article 18, to which it formed a corollary. Consequently, if paragraph 1 of article 18 stated that the right of the beneficiary State to any treatment under a most-favoured-nation clause not made subject to the condition of material reciprocity arose at the time when the obligation of the granting State to extend the relevant treatment to a third State itself arose,[6] then paragraph 1 of article 19 would have to provide that the right of the beneficiary State to any treatment under a most-favoured-nation clause was terminated or suspended at the time when the obligation of the granting State to extend the relevant treatment to a third State was terminated or suspended.

34. In that connexion, he reminded the Commission that, according to the 1976 report of the Sixth Committee, it had been suggested that the words "to a third State" should be inserted after the words "granting State" in paragraph 1 of article 19, both for the sake of clarity and in order to bring that paragraph into line with article 18, paragraph 1 (A/CN.4/309 and Add.1 and 2, para. 247). In his opinion, it was irrelevant whether the obligation to extend the relevant treatment were suspended or terminated as a result of the breach of a treaty by the third State: the manner in which the obligation arose and the manner in which it was suspended or terminated were of no importance.

35. In conclusion, he observed that the wording of article 19 depended on that of article 18: if the Drafting Committee decided to amend article 18, article 19 would have to be similarly amended. He therefore proposed that article 19 should be referred to the Drafting Committee together with article 18.

36. Mr. TSURUOKA said he would submit an amendment to article 19 in the Drafting Committee.

37. The CHAIRMAN said that, if there was no objection, he would take it that the Commission decided to refer article 19 to the Drafting Committee.

It was so agreed.[7]

ARTICLE 20 (The exercise of rights arising under a most-favoured-nation clause and compliance with the laws of the granting State)

38. The CHAIRMAN invited the Special Rapporteur to introduce article 20, which read:

Article 20. The exercise of rights arising under a most-favoured-nation clause and compliance with the laws of the granting State

The exercise of rights arising under a most-favoured-nation clause for the beneficiary State and for persons or things in a determined relationship with that State is subject to compliance with the relevant laws of the granting State. Those laws, however, shall not be applied in such a manner that the treatment of the beneficiary State and of persons or things in a determined relationship with that State is less favourable than that of the third State or of persons or things in the same relationship with that third State.

39. Mr. USAKOV (Special Rapporteur) recalled that article 20 affirmed, on the one hand, that the beneficiary State must respect the relevant laws of the granting State and, on the other hand, that those laws must be applied in such a way as to avoid discrimination between States. Those two rules were to be found in the Vienna Convention on Diplomatic Relations,[8] article 41 of which stipulated that, "Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State", and article 47 that "In the application of the provisions of the present Convention, the receiving State shall not discriminate as between States". Those rules were also included in the Vienna Convention on Consular Relations[9] and the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.[10]

40. The oral comments made by representatives in the Sixth Committee in 1976 had been generally favourable to article 20, which had been found satisfactory on the whole (see A/CN.4/309 and Add.1 and 2, para. 251).

41. With regard to the written comment by Luxembourg (A/CN.4/308 and Add.1 and Add.1/Corr.1,

[5] For consideration of the text proposed by the Drafting Committee, see 1521st meeting, paras. 50-61.

[6] See para. 25 above.

[7] For consideration of the text proposed by the Drafting Committee, see 1521st meeting, paras. 62 and 63.

[8] United Nations, *Treaty Series*, vol. 500, p. 95.

[9] *Ibid.*, vol. 596, p. 261.

[10] *Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), p. 207.

sect. A), article 20 was not intended to allow the granting State to invoke its internal laws in order to restrict the scope of its international obligations or to release itself from them. It was obvious that the beneficiary State was required to respect the law of the granting State only in so far as they were in conformity with the international obligations of that State.

42. Mr. TABIBI was in favour of retaining article 20, which was simply a statement of the obvious and could be referred to the Drafting Committee at once.

43. Mr. ŠAHOVIĆ observed that article 20 stated two separate rules, one concerning the duties of the beneficiary State and the other concerning the duties of the granting State. He hoped that the Drafting Committee would revise the wording of the article so as to formulate those two rules more clearly, as indicated in paragraph 8 of the Commission's commentary.

44. Mr. REUTER agreed with Mr. Šahović. The second sentence of article 20 clearly referred to practices designed to introduce *de facto* discrimination between States. *De facto* discrimination in customs matters was perfectly lawful. It was not clear, however, whether the second sentence referred to abuse of rights. The expression "less favourable" was not very clear in that respect.

45. Mr. SUCHARITKUL was also in favour of requiring respect for national law; however, the condition imposed for enjoyment by the beneficiary State of the right referred to in article 20 did not depend exclusively on the manner of application of those laws. It was not sufficient that, as prescribed in the article, the laws should "not be applied in such a manner that the treatment of the beneficiary State... is less favourable than that of the third State...". If the laws or ground rules favoured, tolerated or permitted discriminatory treatment, they should not be applied, since the effect produced would be inconsistent with the obligation existing under the most-favoured-nation clause.

46. Consequently, it would be advisable to introduce the idea of the substantive quality of the laws and to reword the beginning of the second sentence of the article to read: "Those laws, however, shall not be construed or applied in such a manner...". Construction of the law related more to its non-discriminatory quality, whereas application of the law related more to actual practice.

47. Mr. USHAKOV (Special Rapporteur) pointed out that, under article 20, if persons or things of the beneficiary State were to be entitled to most-favoured-nation treatment, the internal law of the granting State must stipulate that right expressly; for it was only by virtue of the internal law of a State that persons or things of another State could claim any kind of treatment. That did not mean, however, that the beneficiary State was required to comply with laws that conflicted with the international obligations of the granting State; the only laws it must observe were those compatible with the international obligations of the granting State. Thus article 27 of the Vienna Convention on the Law of Treaties[11] provided that "A Party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

48. It was also necessary to stipulate that the laws of the granting State must be applied in the same way to the beneficiary State and the third State, so as to avoid discrimination. That had been the Commission's intention in paragraph 8 of its commentary, and was the object of the second sentence of article 20.

49. Mr. RIPHAGEN thought that a difficulty might arise in the application of article 20. He had in mind the common situation in international trade in which foreign products were given access to a particular market, but a certificate had to be produced before they could be placed on sale. A State would often recognize the certificates issued by another State, but reciprocal recognition of certificates was based on equivalence of standards. It would be advisable to take into consideration the question whether, under the terms of article 20, the beneficiary State of most-favoured-nation treatment also had the right to recognition of its certificates, even if they were issued on the basis of quite different standards.

50. Mr. REUTER was not sure whether the Commission could improve on the second sentence of article 20, but thought it should at least state in its commentary that that sentence had no precise signification. The rule stated might, indeed, have very dangerous consequences in matters such as health, safety at sea, movement of shipping in ports and pollution control, since it would encourage the weakest possible measures.

51. The CHAIRMAN said that, if there was no objection, he would take it that the Commission decided to refer article 20 to the Drafting Committee.

It was so agreed.[12]

52. After a brief procedural discussion in which Mr. USHAKOV, Mr. NJENGA, Mr. FRANCIS and Mr. TABIBI took part, the CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to consider articles 21, 22 and 23 separately, in numerical order, and to examine the customs union issue at a later stage.

It was so agreed.

53. Mr. REUTER said that, if the Commission were to begin by taking up the most general question, one that deserved priority, because it concerned both developing and developed countries, was that of an exception concerning international commodity agreements, which formed part of the new international economic order. In his view, that question should be the subject of a new article, since it was one of the most general and important issues of all.

The meeting rose at 6.05 p.m.

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

[12] For consideration of the text proposed by the Drafting Committee, see 1521st meeting, paras. 64 and 65.