Document:-
A/CN.4/SR.1498

Summary record of the 1498th meeting

Topic:
Most-favoured-nation clause

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

64. The legal bodies of the Arab League had followed the International Law Commission's work with great interest. The conventions concluded on the basis of drafts prepared by the Commission were landmarks in the codification and progressive development of international law. Naturally, the Arab Commission was paying close attention to the current consideration of such important topics as State responsibility, succession of States in respect of matters other than treaties, the most-favoured-nation clause, treaties between States and international organizations or between two or more international organizations, and the law of the non-navigational uses of international watercourses. He also felt bound to express his appreciation of the valuable work of the Codification Division.

65. Co-operation between the International Law Commission and the Arab Commission would undoubtedly assist the latter in the fulfilment of its objectives and he had the honour to extend to the Chairman an invitation to attend the next session of the Arab Commission for International Law.

66. The CHAIRMAN thanked Mr. Alsayed for his very interesting statement, from which the Commission had learned much about the legal work done under the auspices of the League of Arab States. It was indeed very encouraging to hear of the close interest shown in the Commission's work. Unquestionably, co-operation between the Arab Commission and the International Law Commission would prove to be of great value and he was most grateful for the kind invitation to attend the first session of the Arab Commission for International Law.

67. Mr. FRANCIS wished to express his gratitude to Mr. Sen for the courtesy shown to him when he had attended the session of the Asian-African Legal Consultative Committee held at Doha. He had been impressed not only by the organization and conduct of the session, but also by the very high quality of the discussions. The Committee was certainly doing extremely valuable work for the Asian and African regions. The establishment of the Arab Commission for International Law also augured well for the future. Mr. Alsayed would certainly become a familiar figure to the members of the International Law Commission and, as an Arab and an African, he too could take pride in the achievements of the session of the Asian-African Legal Consultative Committee held in Qatar.

68. Mr. TABIBI, speaking on behalf of the Asian members of the Commission, congratulated Mr. Sen and Mr. Alsayed on their excellent statements. The devotion of Mr. Sen to the cause of international law had done much to increase the membership of the Asian-African Legal Consultative Committee, a body that rendered great service to Asian and African governments. The presence of Mr. Alsayed was also most welcome, for Arab jurists had made important contributions not only to the work of the Commission, but also to that of the International Court of Justice. The establishment of the Arab Commission for International Law could not fail to further the work undertaken on the codification and development of international law.

69. Sir Francis VALLAT, speaking on behalf of the Western members of the Commission, said that it was a particular pleasure to join in expressing gratitude and appreciation to Mr. Sen and Mr. Alsayed and to do so after Mr. Tabibi, for it was during Mr. Tabibi's chairmanship of the Commission that new emphasis had been laid on the Commission's relations with regional bodies. The presence of the representatives of such bodies at meetings of the Commission was of enormous assistance, because there was no real substitute for personal contact. He wished to express sincere thanks for the very valuable statements made by Mr. Sen and Mr. Alsayed and was especially pleased that it had been his privilege to be able to inform the Commission, at the beginning of the session, of the request made by the League of Arab States that special relations be established between the Arab Commission for International Law and the International Law Commission.

70. Mr. CASTAÑEDA, speaking on behalf of the Latin American members of the Commission, thanked Mr. Sen and Mr. Alsayed for their statements. The Asian-African Legal Consultative Committee had done extremely valuable work, which had obviously had a great impact on the deliberations of the United Nations Conference on the Law of the Sea. Fortunately, he had had an opportunity to appreciate its work when attending the sessions held in Tokyo and Delhi. It was particularly satisfying to note the strengthening of the ties between the Asian-African Committee and the Inter-American Juridical Committee.

The meeting rose at 1 p.m.

1498th MEETING

Monday, 12 June 1978, at 3 p.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Castañeda, 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, A/CN.4/L.264-266)

[Item 1 of the agenda]

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING (*continued*)

ARTICLE 23 (The most-favoured-nation clause in relation to rights and facilities extended to a land-locked State)[1] (*concluded*)

1. Mr. DADZIE said that, in view of the fundamental importance of the right of land-locked States to free access to the sea, which derived from the principle of the freedom of the high seas, it was essential that the articles on the most-favoured-nation clause should provide for an exception under which that special right of land-locked States was recognized, so as to take account of their natural geographical position. He was therefore quite certain that the rule stated in article 23 would be welcomed by all 29 of the land-locked States, 20 of which were developing countries and 12 of which were located in Africa. It would also be welcomed by the coastal States in Africa that had agreed to provide their less fortunate neighbours with access to the sea.

2. At the previous meeting, Mr. Tabibi had drawn attention to the inappropriateness of the term "land-locked". Although the Commission could certainly rely on Mr. Tabibi, who had made tireless efforts on behalf of the land-locked States, to advise it on that point, his own view was that the expression had now become a term of art and that the interests it served constrained the Commission to retain it. Perhaps the Drafting Committee might look into the matter.

3. Mr. NJENGA said that, although he had no real difficulty with article 23, he thought its provisions should be brought into line with those of part X of the draft convention on the law of the sea, contained in the "Informal Composite Negotiating Text",[2] which was being discussed at the Third United Nations Conference on the Law of the Sea. That part of the Informal Composite Negotiating Text had not yet been adopted, but it commanded the broad support of both land-locked and transit States. In particular, he drew attention to article 126 of the draft convention, which read:

> Provisions of the present Convention, as well as special agreements relating to the exercise of the right of access to and from the sea, establishing rights and facilitaties on account of the special geographical position of land-locked States, are excluded from the application of the most-favoured-nation clause.

Thus, whereas that article provided for total exclusion from the application of the most-favoured-nation clause, article 23 of the draft under consideration excluded only States other than land-locked States. There was no reason, however, why facilities accorded under an agreement between Kenya and Uganda, for example, should not be denied to a land-locked State in Europe in the same way as to any coastal State in Africa. He therefore proposed that the beginning of paragraph 1 of article 23 should be amended to read: "A beneficiary State other than a land-locked State in the region or subregion...". That wording would help to lighten some of the burdens placed on transit States when they accorded facilities to land-locked States.

4. He also proposed that the definition of a land-locked State as "a State which has no seacoast", contained in article 124, paragraph 1 (*a*), of the draft convention on the law of the sea, should be included in the draft before the Commission.

5. Mr. EL-ERIAN recalled that not only had article 23 been approved by many representatives in the Sixth Committee, as the Special Rapporteur had pointed out (A/CN.4/309 and Add.1 and 2, para. 305), but the underlying principle of the article was also embodied in the 1965 Convention on Transit Trade of Land-locked States,[3] and the article was to some extent based on principle VII, adopted by UNCTAD at its first session.[4] It was also in line with the special measures for land-locked countries adopted at the fifth Conference of Heads of State or Government of Non-Aligned Countries.

6. As Mr. Dadzie had stressed, the right of land-locked States to access to and from the sea was based on the principle of the freedom of the high seas. It was also based on the principles of international solidarity and equity, and article 23 was designed to surmount some of the difficulties experienced by certain countries by reason of their geographical situation. Hence he fully supported that article.

7. He shared Mr. Dadzie's view that it would not be appropriate for the Commission to reconsider the use of the term "land-locked State", which had become a term of art.

8. Mr. CASTAÑEDA fully supported both the substance and the wording of article 23. He welcomed the fact that the Special Rapporteur had limited the application of the article to rights and facilities extended to land-locked States to facilitate their access to and from the sea, and had not agreed with the proposal of one member of the Commission that it should also apply to the right of land-locked States to participate in the exploration and exploitation of the living resources of the economic zones of coastal States. Acceptance of that proposal would have made it practically impossible to apply the future convention on the law of the sea. The Special Rapporteur had also been right to avoid the temptation to include a reference to geographically disadvantaged States in article 23.

9. The most-favoured-nation clause was very difficult to apply in matters other than trade, and particularly in matters relating to the right of land-locked States to access to and from the sea, because conditions differed enormously from one region to another. Consequently, Mr. Njenga had perhaps been right in suggesting that the application of article 23 should be limited to land-locked States belonging to the same region or subregion.

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[1] For text, see 1497th meeting, para. 33.

[2] *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. VIII (United Nations publication, Sales No. E. 78.V.4), p. 1, doc. A/CONF.62/WP.10.

[3] See 1489th meeting, foot-note 4.

[4] See *Yearbook... 1976*, vol.II (Part Two), p. 65, doc. A/31/10, chap. II, sect. C, art. 23, para. (2) of the commentary.

10. Mr. SUCHARITKUL also considered that the special relationships that might exist between States varied from country to country and from region to region. He therefore agreed with Mr. Njenga that the exception to the application of the most-favoured-nation clause should cover only rights and facilities extended to land-locked States in the same region or subregion with a view to improving their access to and from the sea; that would amount to providing, in article 23, for an exception to the exception. For example, it was inconceivable that Zambia should claim the same rights and facilities as were extended by Thailand to Laos, because the agreement between Thailand and Laos would necessarily specify the transit routes. Perhaps, therefore, the Commission should consider the concept of geographical proximity in order to take account of the fact that relations between States might vary. In that connexion, he pointed out that Malaysia and Thailand were now in the same position vis-à-vis Viet Nam because of their continental shelf in the Gulf of Thailand, and that Japan and China had become contiguous States because of their continental shelf. It was also necessary to consider the position of States like Singapore, which was not only an island, but nearly surrounded by foreign air-space. It was thus clear that, if the Commission decided to retain article 23 as it stood, States would have to be very cautious in agreeing to most-favoured-nation clauses.

11. Mr. JAGOTA fully supported the retention of article 23, which made an exception for the rights of a beneficiary State other than a land-locked State in respect of the special advantages that might be accorded to a land-locked State by another State to facilitate its access to and from the sea.

12. At the previous meeting, Mr. Tabibi had described recent developments in the law relating to the rights of land-locked States and, in particular, the efforts of those States to expand their trade and obtain access to the resources of the sea. In article 23, however, the Commission was not concerned with the substance of those rights; it was concerned only with the principle that, under a most-favoured-nation clause, a beneficiary State other than a land-locked State would not be entitled to certain rights or facilities that were extended to a land-locked State. In his opinion, that principle was well conceived and should be protected and defended.

13. Mr. Tabibi had suggested that the Commission should enlarge the scope of article 23 by referring to recent developments in the law relating to the resources of the sea. But although the United Nations Conference on the Law of the Sea had made good progress, for example, on the question of the fishing rights of land-locked States in the economic zones of coastal States, nothing had yet been embodied in a generally agreed United Nations document or would take such a form until the Conference had completed its negotiations and reached a consensus on a number of interrelated issues. It would therefore be advisable for the Commission to wait until those developments had crystallized before, as Mr. Njenga had suggested, trying to bring article 23 into line with the provisions adopted by the Conference on the Law of the Sea.

14. With regard to the term "land-locked State", he agreed with Mr. Tabibi that it had a negative connotation, whereas the intention was simply to indicate a State tha had no access to the sea. He considered, however, that the problem had been adequately resolved in the 1965 Convention on Transit Trade of Land-locked States and in the Informal Composite Negotiating Text of the Conference on the Law of the Sea, in which the term "land-locked State" was used and defined. If a definition of the term were needed in the Commission's draft, it could be included as a foot-note to article 23.

15. Lastly, he supported Mr. Njenga's suggestion that the Drafting Committee should consider article 23 in the light of article 126 of the Informal Composite Negotiating Text, provided that no changes were made in the basic provisions now contained in article 23.

16. The CHAIRMAN, speaking as a member of the Commission, supported the existing text of article 23, which fully covered all the situations the Commission had in view. He did not think it need be feared that land-locked States outside a particular region might claim the same rights and facilities as land-locked States within that region. The wording of article 25 made it quite clear that the rights and facilities extended by the granting State to the land-locked State were extended only in order to facilitate its access to and from the sea.

17. If there were no objections, the Chairman would take it that the Commission agreed to refer article 23 to the Drafting Committee for consideration in the light of the comments made during the discussion.

It was so agreed.[5]

Proposed new articles

Article 23 *bis* (The most-favoured-nation clause in relation to treatment extended by one member of a customs union to another member)

18. The CHAIRMAN invited Sir Francis Vallat to introduce his proposal for a new article 23 *bis* (A/CN.4/L.267), which read:

Article 23* bis. *The most-favoured-nation clause in relation to treatment extended by one member of a customs union to another member

A beneficiary State other than a member of a customs union is not entitled under a most-favoured-nation clause to treatment extended by the granting State as a member of the customs union to a third State which is also a member.

[5] For consideration of the text proposed by the Drafting Committee, see 1521st meeting, paras. 80-91.

19. Sir Francis VALLAT, introducing his proposal for a new article 23 *bis,* said that it came within the same general category as articles 22 and 23. The examination of his proposal immediately after articles 22 and 23 thus placed the customs union issue in its proper perspective.

20. A customs union was an international institution, the use of which was now extremely widespread and that took various forms in different parts of the world. It had been his impression, from the commentary to article 15,[6] that there was a rather negative attitude towards customs unions—something that should be avoided when the commentary on that issue was revised. The commentary stressed the lack of evidence of a general exception in favour of customs unions, but did not say much about the lack of evidence of successful claims for most-favoured-nation treatment from members of customs unions. In fact, the general experience had been that States with most-favoured-nation clauses had not wished such clauses to constitute obstacles to States intending to join a customs union or other similar associations of States. That was a point that should be made in the commentary. The commentary should also place more emphasis on the widespread use of customs unions and free-trade areas in the modern world, for the task of developing countries would be greatly facilitated if they knew that they did not have to be concerned in any way with the effect of most-favoured-nation clauses on steps taken towards integration in matters of trade and customs. Article 23 *bis* contained a clear-cut legal test that could be used to determine when a State was entitled to relief from a most-favoured-nation clause.

21. Reason would seem to be entirely on the side of the inclusion in the draft articles of a provision such as the one he was now proposing, but whether it should take the form of an exception was less clear. Article 23 *bis* dealt with the effect of some sort of abstract and ideal most-favoured-nation clause. Accordingly, an exception for customs unions seemed quite natural, and it would require very clear language in an agreement to show that, by granting most-favoured-nation treatment, a State intended to debar itself from entering into a customs or other type of union with other States in the future. The treatment accorded to a member as such was of a different order from the treatment simply extended to a third State as such. Although he doubted whether the Commission was engaging in the progressive development of international law in discussing customs unions, he thought it should move with the times and take account of the trend towards integration in matters of trade and customs, even if that involved an element of progressive development.

22. He had drafted article 23 *bis* in the style of the other articles to which it was related and it was thus open to as much improvement as they were. For example, he did not think it was accurate to say that a State was entitled to "treatment extended"; rather, it was entitled to "treatent not less favourable than". Such drafting problems, however, could be dealt with by the Drafting Committee.

23. It might be asked exactly what a customs union was. The problem of definition was not, however, insuperable, if, indeed, a definition were necessary at all. It was certainly less difficult to define a customs union than to deflne a "developing" or a "developed" country, or "frontier traffic". "Frontier traffic" was a very elastic term, that could almost be extended to cover the content of draft article 23 *bis,* since a customs union involved an area in which goods moved freely and in which the States concerned were nearly always contiguous. Article 23 *bis* was thus closely linked to article 22 and, in a sense, a natural extension of it. The Commission might therefore find it more logical to place article 23 *bis* after article 22.

24. Mr. USHAKOV (Special Rapporteur) suggested, in connexion with article 23 *bis,* that the Commission should consider the comments made by Member States and international organizations on article 15, since those comments related not so much to article 15 itself as to the exceptions to be included in the draft articles for certain economic unions.

25. In the Sixth Committee, in 1976, some representatives had spoken in favour of including in the draft articles a rule establishing a general exception to the principle of the application of the most-favoured-nation clause in the case of customs unions and other associations of States; others had opposed the introduction of such a rule (A/CN.4/309 and Add.1 and 2, paras. 178 *et seq.*).

26. In their written comments, some States, for example the Byelorussian SSR, the German Democratic Republic, Hungary and the USSR (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. A), had opposed the inclusion of an exception to the operation of the most-favoured-nation clause in the case of customs unions and similar associations. Others, for example Guyana, Luxembourg and Sweden (*ibid.*), had favoured such an exception.

27. Among the international organizations, the secretariat of GATT (*ibid.*, sect. C, 3) had considered that the question of the application of the clause in the case of economic unions should be the subject of negotiations in specialized international organizations, and hence did not lend itself easily to codification at that stage.

28. ECWA was in favour of including a stipulation that the clause did not refer to "intro-customs union treatment" (*ibid.*, sect. B). The Board of the Cartagena Agreement also advocated making "exceptions from the general rule in the cases of customs unions, free-trade areas and other similar associations of States, as in the General Agreement on Tariffs and Trade" (*ibid.*, sect. C, 4).

29. EEC, for its part, whose position was shared by the Netherlands (*ibid.*, sect. A), considered that con-

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

firmation of an exception for customs unions could be found in both the practice and the doctrine of States and that, even if a normal rule to that effect and the current practice of governments did not exist, international law should establish such an exception. It therefore proposed supplementing articles 15 and 16 with a new article 16 *bis*, establishing an exception to the application of the most-favoured-nation clause for "in particular economic unions, customs unions or free-trade areas" (*ibid.*, sect. C, 6, para. 11).

30. In his opinion, a generally recognized exception to the operation of the most-favoured-nation clause in the case of economic unions of States did not currently exist in international law. That could be seen from the Commission's commentary to article 15. Admittedly, many exceptions of that kind were to be found in treaties containing a most-favoured-nation clause or in the clause itself. But did that prove that such exceptions were admitted as a general rule, that it was consequently unnecessary to include them in treaties containing a most-favoured-nation clause and that customs unions were automatically excluded from application of the clause? The Commission had answered that question in the negative and he took the same position. If it could be concluded from the frequent examples of exceptions to the clause that such exceptions formed a customary rule, the same conclusion must be drawn in regard to the clause itself, which was much more common in treaties than the exceptions. However, the fact that the most-favoured-nation clause was found in so many treaties did not prove that it constituted a generally accepted customary rule. Indeed, as the Commission had pointed out in its commentary to article 6:

> Although the grant of most-favoured-nation treatment is frequent in commercial treaties, thee is no evidence that it has developed into a rule of customary international law.[7]

It was thus impossible to assert that an exception to the clause, which was less frequent than the clause itself, was a rule of customary international law.

31. However, even if an exception for economic unions did not exist as *lex lata*, it could be introduced into the draft articles as *lex ferenda*, for the progressive development of international law. In his report (A/CN.4/309 and Add.1 and 2, paras. 205-217), he had pointed out the difficulties that would confront any attempt to introduce such a rule into the draft articles. Answers would be needed to three questions: For which areas of the operation of the clause were exceptions in favour of economic unions of States necessary? For which specific economic unions of States and on what specific conditions should an exception to the clause be made? Was it sufficient to provide for exceptions only in the case of economic unions of States, or were other unions of States and certain economic agreements in a similar situation?

32. With regard to the first question, he thought it would be so difficult to determine the specific clauses for which exceptions should be made in favour of economic unions that the only alternatives were to cover either all the clauses by exceptions or none at all.

33. As to the second question, he recalled that in the Commission's commentary the matter of exceptions for economic unions of States had been discussed under the heading "The case of customs unions and similar associations of States". The term "similar associations of States" was acceptable only inasmuch as it demonstrated the inadvisability of formulating exceptions. If exceptions were introduced in the draft, it would be necessary to draw up an exhaustive list of the economic unions to which they were to apply. In the oral and written comments, reference had been made to customs unions, free-trade areas, economic communities and regional and subregional integration. In addition to that list, it would be necessary to give a legal definition of each type of union to be covered by the exceptions. Unlike Sir Francis Vallat, he considered that such definitions would be indispensable. The General Agreement on Tariffs and Trade contained definitions of a customs union and a free-trade area. In the absence of such definitions, the exceptions for economic unions provided for under the General Agreement would not apply. For the purposes of the draft, it would be necessary to provide for much wider exceptions, covering all possible associations of States. If the Commission made exceptions for only type of economic union, other types would be placed at a disadvantage.

34. In regard to regional and subregional integration, it should be noted that not every type of integration called for exceptions to application of the clause. It was true that, in the case of EEC, economic integration required exceptions so that the treatment accorded to each other by two member States would not be extended to a non-member State through the operation of the most-favoured-nation cause; the same did not apply, however, to CMEA, since the economic integration of the socialist countries was based on different principles.

35. As to the third question, regarding the advisability of extending the exceptions to certain economic agreements that were in a similar situation to that of economic unions of States, the exceptions to obligations under the General Agreement on Tariffs and Trade were interpreted as relating not only to customs unions and free-trade areas but also to preliminary agreements leading to the establishment of a customs union or free-trade area. In the context of the draft, if the exceptions were to be of such wide scope, it would be necessary to define economic agreements of that kind, and that would not be easy.

36. Consequently, he thought it was almost impossible to draft a general clause on exceptions for economic unions of States. On the other hand, it was always possible, and relatively easy, to provide for exceptions in specific cases. The member States of an economic union usually had no difficulty in determining which existing clauses and the agreements containing them required revision to provide for ex-

[7] *Yearbook... 1976*, vol. II (Part Two), p. 20, doc. A/31/10, chap. II, sect. C, art. 6, para. (3) of the commentary.

ceptions, so that beneficiary States that were not members of the union would not be able to claim certain treatment extended by member States to one another. Similarly, a State that was about to become a member of an economic union would take care to include such an exception, where necessary, in the most-favoured-nation clauses it contracted as a granting State.

37. Turning to the proposed new articles, he pointed out that, in article 23 *bis*,[8] Sir Francis Vallat referred only to customs unions, although he had mentioned similar associations in his oral presentation of the article. An article of that type could not be confined to customs unions, since States and international organizations, in their oral and written comments, had mentioned a number of other types of economic union.

38. Article 21 *ter* proposed by Mr. Reuter (A/CN.4/L.265)[9] made an exception for treatment extended under commodity agreements. That was really an exception to article 15, under the terms of which the most-favoured-nation clause was applicable whether the treatment extended to the third State was extended under a bilateral or a multilateral agreement. Thus the purpose of article 21 *ter* was to exclude agreements governing the economic régime of a commodity. Hence that question should not be considered for the time being. Moreover, it might well be asked why an exception should be made for commodity agreements but not for agreements on manufactures or semi-manufactures. According to Mr. Reuter, article 21 *ter* should benefit developing countries. But in commodity trade the beneficiary State of a most-favoured-nation clause was normally a developing country, whereas the granting State was a developed country. It followed that the beneficiary State would not be able to claim, for its commodities, the advantages accorded by the granting State to third States on its own market. If the developed granting State was a party to a "universal" agreement but the developing beneficiary State was not, the latter would not be able to invoke the clause. If developing beneficiary States were to be benefited and protected, they would automatically have to become parties to such universal agreements. In addition, article 21 *ter* did not refer to regional agreements, although there was no reason why such agreements should not be placed on the same footing as universal agreements. Thus the proposed article would not achieve its purpose, which was to benefit developing countries.

39. As to article A proposed by Mr. Reuter (A/CN.4/L.264),[10] it belonged to the law of treaties. Under the terms of that article, a beneficiary State was not entitled to the treatment extended by a granting State under an agreement in conformity with the Charter of Economic Rights and Duties of States[11] if the grant of the benefit of the clause was contrary to the object and purpose of such an agreement and if the agreement was universal. A provision of that kind would be feasible if all States accepted the principle that universal agreements must be in conformity with the Charter of Economic Rights and Duties of States. The Commission, however, could not propose such a rule, even in the context of the progressive development of international law. In his article, Mr. Reuter also proposed that the conformity of the agreement with the principles of the Charter of Economic Rights and Duties of States should be subject to review by an organ of the United Nations or an organization of a universal character belonging to the United Naions family. Such a proposal was not acceptable. Sovereign States could not be deprived of the right to interpret for themselves the agreements to which they were parties, even were that task to be entrusted to an organ of the United Naions. For that to be possible, the conformity of a universal agreement with the principles of the Charter of Economic Rights and Duties of States would have to be erected into a rule of *jus cogens*, which was far from being the case.

40. In brief, it was not possible to draft a general provision on exceptions for economic unions. The difficulties to which such unions might give rise in regard to the application of a most-favoured-nation clause could be overcome by means of exceptions made in each particular case, when the clause was negotiated.

41. Mr. TSURUOKA was similarly convinced that it would be useless to provide for exceptions for economic unions in the draft articles. The Commission had reached that conclusion after discussing the question at length. The main reason for its decision had been concern to avoid institutionalizing discrimination. When a State undertook to grant most-favoured-nation treatment, it undertook not to place the beneficiary State in a situation involving discrimination in relation to a third State. If the granting State was a member of an economic union and did not accord to the beneficiary State the treatment that it extended to a third State that was a member of the union, it committed an act of discrimination against the beneficiary Stae, and that was precisely what the most-favoured-nation clause was intended to prevent. It should not be forgotten that, in practice, a granting State that was a member of an economic union could try to persuade a non-member beneficiary State to forgo application of the clause to advantages granted within the union. Nothing in the draft prevented it from doing so. Moreover, in commerce a practice had developed along those lines. Admittedly, it was sometimes difficult to persuade the beneficiary State to agree to such an exception to the operation of the clause, but granting States usually succeeded, for example by providing for prior consultation procedure, to be applied before the beneficiary State was finally deprived of an advantage granted within a union.

42. Practical reasons also militated against any exceptions to the application of the clause in the case

[8] See para. 18 above.

[9] See 1495th meeting, para. 22.

[10] *Ibid.*, para. 23.

[11] General Assembly resolution 3281(XXIX).

of economic unions. It would be difficult to define a customs union precisely and to distinguish advantages accorded within such a union from those extended outside it. The difficulties increased when a customs union became an economic union, which might in turn become a political union. There was nothing to prevent such developments, but they should not harm a beneficiary State that remained outside the union.

43. Lastly, he empnasized the importance of articles 25 and 26 in that connexion. The purpose of those provisions was to avoid hindering the development of unions of States, without prejudice to the obligations assumed by the granting State towards the beneficiary State, in accordance with the great principle *pacta sunt servanda.*

44. Mr. CALLE Y CALLE said that the subject of Sir Francis Vallat's proposed new article 23 *bis* was a controversial one that had given rise to differences of opinion in the Commission and in the Sixth Committee of the General Assembly.

45. Many States that participated in customs unions and integration schemes were reluctant to accept the general idea underlying article 15 (Irrelevance of the fact that treatment is extended under a bilateral or a multilateral agreement), namely, that the source of the treatment extended to a third State in no way affected the automatic and unrestricted application of the most-favoured-nation clause.

46. International organizations did not support that idea either. The GATT secretariat, for instance, after noting in its comments that the draft did not refer to customs unions, free-trade areas or similar groupings, had stated that it assumed that the Commission, in its further work, would take account of the developments that had taken place in that connexion (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. C, 3). In other words, it considered that the Commission should not disregard an international reality—a need felt by countries, particularly developing countries, that were seeking to promote their development through customs unions and integration schemes.

47. On the other hand, it had been said that State practice in fact excepted customs unions and integration schemes from the application of the clause, because it was an obstacle to their satisfactory operation. The weight of doctrine was clearly in favour of such an exception. As far back as 1936, the Institute of International Law had referred to customs unions as a necessary exception,[12] and in 1969 it had stated in unequivocal terms that a beneficiary State should not be able to invoke the clause to claim treatment identical with that granted to one another by States participating in a regional integration scheme.[13] One of the alternative articles relating to customs unions and free-trade areas proposed by the late Mr. Hambro[14] had been on those lines.

48. Furthermore, EEC, in its comments, had expressed the view that the exception in question was a customary rule, but had added that, if no such exception existed, it would have to be established (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. C, 6, para. 10). The Commission thus had to decide whether to establish such an exception by embodying it in the draft.

49. He agreed that a more balanced approach was needed in the commentary to article 15, which suggested that it was impossible to cover or provide for the kind of situation in question. After all, it was States that would conclude agreements containing the clause, and it was when they did so that the scope of the provisions agreed upon would be decided. That was particularly true because the convention would apply to all future treaties containng the clause.

50. In his view, therefore, the Commission should give the closest consideration to the proposed article 23 *bis,* which would meet a real need and satisfy the aspirations of States as expressed in the Sixth Committee of the General Assembly and reflected in their written comments. The article would also dispel some of the concern expressed by members of the Commission.

The meeting rose at 6.15 p.m.

[12] *Yearbook... 1969,* vol. II, p. 180, doc. A/CN.4/213, annex II, resolution, para. 7.

[13] *Annuaire de l'Institut de droit international,* 1969, Basel, vol. 53, t. II, p. 379.

[14] See *Yearbook... 1976,* vol. II (Part One), p. 135, doc. A/CN.4/L.242.

1499th MEETING

Tuesday, 13 June 1978, at 9.35 a.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Castañeda, 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, A/CN.4/L.264-266)

[Item 1 of the agenda]

PROPOSED NEW ARTICLES (*continued*)

ARTICLE 23 *bis* (The most-favoured-nation clause in relation to treatment extended by one member of a customs union to another member)[1] (*continued*).

[1] For text, see 1498th meeting, para. 18.