Document:-
**A/CN.4/SR.1404**

**Summary record of the 1404th meeting**

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

Extract from the Yearbook of the International Law Commission:-
**1976, vol. I**

48. Paragraph 3 (*d*) was, he thought, especially important. For the international crimes enumerated in the preceding subparagraphs, with the exception of aggression, should sooner or later become things of the past; colonialism and slavery, genocide and *apartheid* were destined—or so it was hoped, at least—to disappear. But the crimes referred to in subparagraph (*d*) could be the crimes of the future: depriving human beings of their environment, taking away their sources of supply, causing climatic changes, etc. Mr. Ushakov had pointed out that the example chosen for subparagraph (*d*) was not entirely satisfactory, but that could be remedied later.

49. As to paragraph 4, he hoped that a term could be found in English to render the French notion of *délit*. It would be regrettable to have to abandon that provision for lack of a suitable English term.

50. Draft article 18 was particularly important because it committed the Commission. It had enabled the Commission to throw light on one of the most important aspects of State responsibility, if not of all international law. Although the wording might be open to criticism, it was the result of the praiseworthy efforts of the Drafting Committee. He hoped, therefore, that the Commission would adopt the provision unanimously.

51. Mr. ŠAHOVIĆ speaking as a member of the Commission, said that in formulating the article under consideration, the Commission had done work of historic importance. He fully shared the views of the Special Rapporteur and approved of the draft article proposed by the Drafting Committee.

52. Speaking as Chairman of the Drafting Committee, he emphasized that the articles drafted by that Committee were in no way compromises. They had been prepared on the basis of the texts proposed by the Special Rapporteur, in the light of the Commission's discussions. Each member of the Drafting Committee had made his contribution, as a jurist, to the drafting of texts that were in conformity not only with the development of the rules on the international responsibility of States, but also with the development of the international legal order as a whole.

53. Article 18, as proposed by the Drafting Committee, respected the ideas of the Special Rapporteur. The wording had been improved to make it correspond more closely to the needs of the international community and of contemporary international law. The concept of international crime had been envisaged having regard to the present and to the future. The Drafting Committee had taken into account the views of all the members of the Commission, and the practice of States on which the Special Rapporteur had mainly based his work. Article 18 certainly involved taking a position which would have important repercussions on the future development of international law.

54. Mr. USHAKOV said he hoped that his reservations regarding the last phrase of paragraph 3 (*d*), "such as those prohibiting massive pollution of the atmosphere or of the seas", would be reflected in the commentary to article 18.

55. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed unanimously to approve article 18 as proposed by the Drafting Committee.

*It was so agreed.*

*The meeting rose at 1.5 p.m.*

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## 1404th MEETING

*Thursday, 8 July 1976, at 3.10 p.m.*

*Chairman:* Mr. Abdullah EL-ERIAN

*Members present:* Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Kearney, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

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### Most-favoured-nation clause * (*concluded*) (A/CN.4/293 and Add.1; A/CN.4/L.244)

[Item 4 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Commission to consider the draft articles on the most-favoured-nation clause proposed by the Drafting Committee.

2. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) drew attention to document A/CN.4/L.244, containing the set of draft articles on the most-favoured-nation clause adopted by the Drafting Committee at the present session. Before introducing the new texts, namely, articles 21, E, F, B, C, D, 21 *bis* and subparagraph (*e*) of article 2, he wished to make some preliminary comments. In the first place, as explained in the note at the beginning of the document, some drafting changes had been made to the texts of some of the articles already adopted by the Commission [1] in order to make the terminology consistent throughout the draft. As the note stated, those changes were indicated by underlined words and foot-notes. Most of them resulted from the Drafting Committee's decision to use systematically, throughout all the draft articles, the verbs "to accord" in English, *accorder* in French, *otorgar* in Spanish and *predostavlyat* in Russian when referring to the treatment applied by the granting State to the beneficiary States, and the verbs "to extend" in English, *conférer* in French, *conferir* in Spanish and *predostavit* in Russian when referring to the treatment applied by the granting State to a third State. With respect, in particular, to the text of article 5,

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* Resumed from the 1389th meeting.

[1] For the text of the articles adopted by the Commission, see *Yearbook... 1975*, vol. II, p. 120, document A/10010/Rev.1, chap. IV, sect. B.

the necessary changes had been made in the French, Russian and Spanish versions, while in the English version, the corresponding verbs had been added to make the text uniform in the four languages. In addition, the verb "to accord", and its equivalents in the other languages had been used wherever material reciprocity was involved. In article 17, the square brackets round the words "or other" had been deleted, since the discussion that had taken place in the Sixth Committee of the General Assembly, whose attention had been drawn to those words, had indicated that there was no objection to their inclusion.[2] As to the deletion of the words in square brackets at the beginning of article 16, he would revert to that point in connexion with article D.

3. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to approve the drafting amendments indicated by the Chairman of the Drafting Committee.

*It was so agreed.*

4. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said it was now his duty to inform the Commission that the Drafting Committee had decided not to adopt, for inclusion in the draft articles, two of the texts referred to it by the Commission and initially proposed by the Special Rapporteur in his seventh report (A/CN.4/293 and Add.1). They were the new clause (4) proposed for insertion in the introductory sentence of article 3 (*ibid.*, para. 21) and the new article A (*ibid.*, para. 9). With regard to the new clause (4) to be inserted in article 3, the Drafting Committee and the Special Rapporteur had agreed that the suggested addition was not particularly necessary, since the proposed clause would deal with a situation seldom encountered in current practice. They had also rejected an article based on the article A initially proposed by the Special Rapporteur. That article had dealt with the relationship between the draft articles and the Vienna Convention on the Law of Treaties.[3] The Drafting Committee had decided that there was no need for such an article in the draft and that it might be a source of confusion if the parties to a future convention based on the draft articles were not also parties to the Vienna Convention and vice versa. The Committee had also taken the view that, since the draft articles applied only to most-favoured-nation clauses contained in treaties between States, it was obvious that the general rules of the law of treaties would apply in any case.

5. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to approve the decisions by the Drafting Committee which had just been explained.

*It was so agreed.*

ARTICLE 2 (Use of terms) subparagraph (*e*) ("material reciprocity")[4]

6. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for sub-paragraph (*e*) of article 2:

*Article 2. Use of terms*

**[For the purposes of the present articles:**

**...]**

**(*e*) "material reciprocity" means that the beneficiary State is entitled to the treatment provided for under a most-favoured-nation clause only if it accords equivalent treatment to the granting State in the agreed sphere of relations.**

7. He reminded the Commission that, in his seventh report, the Special Rapporteur had taken up the suggestion previously made by certain members that a definition of "material reciprocity" should be included in article 2 (Use of terms). On the basis of the discussion in the Commission and the proposals submitted, the Drafting Committee had slightly amended the initial proposal by the Special Rapporteur and had adopted the present text, according to which the expression "material reciprocity" meant that the beneficiary State was entitled to the treatment provided for under a most-favoured-nation clause only if it accorded equivalent treatment to the granting State in the agreed sphere of relations. In that text, the words "equivalent treatment" replaced the words "the same treatment in kind", used by the Special Rapporteur in his first proposal. The phrase "in the agreed sphere of relations" made the concept of material reciprocity more precise, and linked it with the definition of the most-favoured-nation clause in article 4.

8. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to approve subparagraph (*e*) of article 2 as proposed by the Drafting Committee.

*It was so agreed.*

ARTICLE 21[5] (Most-favoured-nation clauses in relation to treatment under a generalized system of preferences)

9. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 21:

*Article 21. Most-favoured-nation clauses in relation to treatment under a generalized system of preferences*

**A beneficiary State is not entitled under a most-favoured-nation clause to any treatment extended by a developed granting State to a developing third State on a non-reciprocal basis within a generalized system of preferences established by that granting State.**

The Drafting Committee had adopted article 21 exactly as it had been provisionally adopted by the Commission at the twenty-seventh session. Although some drafting amendments had been proposed during the discussion at the present session, it had taken the view that, since the

[2] See *Official Records of the General Assembly, Thirtieth Session, Annexes*, agenda item 108, document A/10393, paras. 120-164.

[3] For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

[4] For previous discussion, see 1378th meeting.

[5] See 1386th meeting, paras. 37-43 and 1387th meeting.

article had, on the whole, been favourably received by the Sixth Committee at the last session of the General Assembly and, indeed, by the members of the Commission, which had referred it to the Drafting Committee, the best course was to leave it as it stood.

The title and text of article 21 had therefore been submitted without change.

10. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to approve article 21 as proposed by the Drafting Committee.

*It was so agreed.*

11. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said that, for the convenience of members of the Commission, the texts of the articles which he was about to introduce had been reproduced in document A/CN.4/L.244 with the numbers or letters given by the Special Rapporteur to the corresponding original articles. The Drafting Committee had, however, placed them in the order in which it thought they should appear in the draft. The final numbering was shown in square brackets for each article.

ARTICLE E [22] (Most-favoured-nation clauses in relation to treatment extended to land-locked States)[6]

12. The Drafting Committee proposed the following text for article E [22]:

***Article E [22]. Most-favoured-nation clauses in relation to treatment extended to land-locked States***

**1. A beneficiary State other than a land-locked State is not entitled under the most-favoured-nation clause to rights and facilities extended by the granting State to a land-locked third State to facilitate its access to and from the sea.**

**2. A land-locked beneficiary State is entitled under the most-favoured-nation clause to the rights and facilities extended by the granting State to a land-locked third State and relating to its access to and from the sea only if the most-favoured-nation clause relates especially to the field of access to and from the sea.**

13. In paragraphs 80 to 82 of his seventh report, the Special Rapporteur had proposed the inclusion of an article dealing with the most-favoured-nation clause in relation to treatment extended to land-locked States. The Drafting Committee had adopted a new version of that article, in two paragraphs, taking account of the concern expressed by various members of the Commission during the discussion on the initial proposal. Paragraph 1 of the article referred to the case in which the beneficiary State was not a land-locked State and reproduced the tenor of the general rule contained in the Special Rapporteur's original single paragraph. It provided that a beneficiary State other than a land-locked State was not entitled under the most-favoured-nation clause to rights and facilities extended by the granting State to a land-locked third State to facilitate its access to and from the sea. Paragraph 2 introduced a specific provision concerning the case in which the beneficiary State was a land-locked State. That paragraph stipulated that a land-locked beneficiary State was entitled under the most-favoured-nation clause to the rights and facilities extended by the granting State to a land-locked third State and relating to its access to and from the sea only if the most-favoured-nation clause related especially to the field of access to and from the sea. It should be noted that paragraph 2 reproduced the *ejusdem generis* rule incorporated in articles 11 and 12. Thus although the paragraph might not appear to be absolutely necessary, the Drafting Committee had thought its inclusion desirable in order to make it quite clear that it was only under a clause relating especially to the field of access to and from the sea that a land-locked beneficiary State acquired the advantages extended in the same field to a third land-locked State. The title accordingly read: "Most-favoured-nation clauses in relation to treatment extended to land-locked States".

14. Sir Francis VALLAT proposed that the words "rights and facilities", in paragraphs 1 and 2, should be replaced by the word "treatment", which was used in the title of the article.

15. Mr. USTOR (Special Rapporteur) endorsed that proposal. The word "treatment" was used in the other articles of the draft. Moreover, the title and the text of the article would thus be aligned, and the inelegant wording "rights and facilities ... to facilitate ..." would be avoided.

16. Mr. TABIBI said that the article was not concerned with the "treatment" extended to land-locked States, but with the fundamental principles of the freedom of the high seas, in other words, with the rights of land-locked States. It would be better to amend the title of the article accordingly.

17. Sir Francis VALLAT observed that the term "treatment" was much more comprehensive than "rights and facilities" and would be more favourable to the land-locked States.

18. Mr. SETTE CÂMARA agreed that the word "treatment" expressed a much broader concept. The expression "rights and facilities", however, related exclusively to access to and from the sea; it should be retained because it was more precise.

19. Mr. CALLE Y CALLE pointed out that article F [23], for example, spoke of "treatment ... to facilitate frontier traffic". The word "treatment" covered rights and facilities concerning access to and from the sea and its use would be more in keeping with the other articles of the draft.

20. Mr. USHAKOV said that the expression "rights and facilities" was perfectly clear, whereas the use of the word "treatment", which was not sufficiently specific, might lead to difficulties in interpreting the article.

21. Mr. AGO said that the term "treatment" had, indeed, a much broader meaning than the expression "rights and facilities". The purpose of article E, however, was not to accord treatment, but to make an exception to the granting of treatment. The intention was not to say that a State having common frontiers with several

[6] For the discussion on the text originally submitted by the Special Rapporteur, see 1385th and 1386th meetings.

land-locked States must accord to those different States the same treatment as it extended to one of them. For instance, if Italy were to extend exceptional treatment to Switzerland by placing at its disposal a dock in the port of Genoa, it was not bound to accord that treatment to any and every other land-locked country. The rights and facilities involved related only to the access of land-locked countries to and from the sea. The expression "rights and facilities" was thus preferable to the term "treatment", because it was more restricted.

22. Mr. BILGE proposed that the expression "land-locked State" should be put in the singular in the title, since it was used in the singular in the body of the article.

23. Sir Francis VALLAT said that the title could, of course, be changed. But while one could "extend treatment", one could not "extend facilities". It would be better to reconsider the matter during the second reading of the draft articles.

24. The CHAIRMAN, speaking as a member of the Commission, said it was not essential that the title of an article should always correspond exactly with the text.

25. Mr. SETTE CÂMARA, referring to the point raised by Mr. Bilge, said it might be preferable to refer to "most-favoured-nation clauses", in the plural. For instance, Brazil extended certain treatment to two land-locked States, Bolivia and Paraguay. Nevertheless, he would not insist on the use of the plural.

26. Mr. USTOR (Special Rapporteur) noted that the use of the singular as proposed by Mr. Bilge would necessitate consequential changes in other articles of the draft.

27. The CHAIRMAN suggested that the matter be left to the Special Rapporteur. If there were no further comments, he would take it that the Commission agreed to that suggestion and to approve article E [22] as proposed by the Drafting Committee.

*It was so agreed.*

ARTICLE F [23] (Most-favoured-nation clauses in relation to treatment extended to facilitate frontier traffic)[7]

28. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article F [23]:

***Article F* [23]. *Most-favoured-nation clauses in relation to treatment to facilitate frontier traffic***

**1. A beneficiary State other than a contiguous State is not entitled under the most-favoured-nation clause to the treatment extended by the granting State to a contiguous third State in order to facilitate frontier traffic.**

**2. A contiguous beneficiary State is entitled under the most-favoured-nation clause to the treatment extended by the granting State to a contiguous third State and relating to frontier traffic only if the most-favoured-nation clause relates especially to the field of frontier traffic.**

29. Article F [23] originated in paragraphs 35 to 39 of the Special Rapporteur's seventh report, which constituted a section relating to "frontier traffic" and reflected what seemed to be the general opinion of the members of the Commission concerning the need to include an article on frontier traffic in the draft articles. Its structure was like that of the preceding article E [22]. Thus, paragraph 1, which stated the general rule, dealt with the situation in which the beneficiary State was not contiguous to the granting State, while paragraph 2 covered the special situation in which the beneficiary State was a contiguous State. As in article E [22], paragraph 2 of article F [23] reaffirmed the *ejusdem generis* rule stated in articles 11 and 12 which related to the subject-matter of the clause. It was therefore clear that a contiguous beneficiary State was entitled under the most-favoured-nation clause to the treatment extended by the granting State to a contiguous third State and relating to frontier traffic, only if the clause related especially to the field of frontier traffic. The Drafting Committee had considered that, in English, the word "contiguous" corresponded better to the French word *limitrophe* and better rendered the meaning of the words *frontière commune* than a word such as "adjacent".

30. Following the example of article E [22], the title of article F [23] read: "Most-favoured-nation clauses in relation to treatment extended to facilitate frontier traffic".

31. Mr. USHAKOV pointed out that, in the titles of articles E [22] and F [23], the word "clauses" was in the singular in the French text and in the plural in the English text. The two texts should be made uniform.

32. Mr. BILGE proposed that article F [23] should be placed before article E [22] because, in his opinion, the question of frontier traffic was more important than that of land-locked States.

33. The CHAIRMAN said that the Special Rapporteur would take into consideration the observations made. If there were no further comments, he would take it that the Commission agreed to approve article F [23] as proposed by the Drafting Committee.

*It was so agreed.*

THE CUSTOMS-UNION ISSUE

34. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said that, in adopting articles 21, E and F, the Drafting Committee had dealt with what could rightly be called "exceptions" to the application of the most-favoured-nation clause. Members would recall that the Commission had also discussed the advisability of including a provision dealing with the "Customs-union issue",[8] which some might consider to be an implied exception. The Special Rapporteur had not proposed an article on that issue, and the Commission had referred the question to the Drafting Committee, asking it to consider whether a provision on customs unions should be included in the draft, or whether it would be better

[7] For the discussion of the Special Rapporteur's proposals concerning exceptions to the operation of the clause (A/CN.4/293 and Add.1, paras. 31 to 39), and in particular frontier traffic, see 1380th meeting, paras. 37-44 and 1381st meeting, paras. 1-28.

[8] See 1381st to 1384th meetings.

to deal with the matter in the Commission's report. After examining the matter from that angle, the Drafting Committee had decided against the inclusion of an article on the "Customs-union issue". It had considered the proposals submitted by a member of the Commission and various other proposals on the subject. It had concluded that it was not possible to draft a text which would reconcile the different points of view expressed, and that it was better not to try to adopt an article which could not be unanimously supported by the members of the Commission. It had also been emphasized in the Drafting Committee that the adoption of article C would make it clear that, so far as Customs unions and similar associations of States were concerned, the present articles would not affect relations based on most-favoured-nation clauses contained in treaties which had been in force before the present articles took effect. Having regard to those considerations and to the Commission's discussion on the "Customs-union issue", the Drafting Committee had decided not to propose the inclusion of any article on that issue in the draft. The Committee nevertheless considered that it would be advisable to give, in the Commission's report, a suitable account of the differing views which had been expressed in the Commission.

35. Mr. AGO said that the Drafting Committee had not really decided against including an article on the Customs-union issue in the draft, but had rather abandoned the attempts to find a text acceptable to all its members. The Commission's report should therefore clearly indicate the differences of opinion which had arisen on that issue in the Drafting Committee.

36. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve the decision taken by the Drafting Committee on the Customs-union issue.

*It was so agreed.*

ARTICLE B [9] [24] (Case of State succession, State responsibility and outbreak of hostilities)

37. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article B [24]:

***Article B* [24]. *Cases of State succession, State responsibility and outbreak of hostilities***

**The provisions of the present article shall not prejudge any question that may arise in regard to a most-favoured-nation clause from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.**

38. Article B [24] was based on article 73 of the Vienna Convention on the Law of Treaties and on the corresponding provisions of the draft articles on succession of States in respect of treaties.[10] Since the article proposed by the Special Rapporteur had been generally approved during the Commission's discussions, the Drafting Committee had adopted it without change as article B [23]. That article indicated that the provisions of the present articles did not prejudge any question that might arise, in regard to a most-favoured-nation clause, from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.

39. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to approve article B [24] as proposed by the Drafting Committee.

*It was so agreed.*

ARTICLE C [11] [25] (Non-retroactivity of the present articles)

40. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article C [25]:

***Article C* [25]. *Non-retroactivity of the present articles***

**Without prejudice to the application of any rule set forth in the present articles to which most-favoured-nation clauses would be subject under international law independently of the articles, the articles apply only to most-favoured-nation clauses embodied in treaties which are concluded by States after the entry into force of the present articles with regard to such States.**

41. Article C [25] was modelled on article 4 of the Vienna Convention. It provided for the non-retroactivity of the present articles. The Drafting Committee had considered the question of the link between draft article C [25] and article 28 of the Vienna Convention, but it had found that the two articles dealt with quite different problems and that article C [25], which dealt only with the non-retroactivity of the present articles, could therefore be adopted without prejudice to the general rules of the law of treaties relating to non-retroactivity, as stated in article 28 of the Vienna Convention. The Drafting Committee had considered that article C [25] was important because it stressed that the present articles did not apply to most-favoured-nation clauses contained in treaties concluded before the entry into force of those articles, such as treaties relating to customs unions or other associations of States. The Drafting Committee had adopted the title and text of article C [25] as proposed by the Special Rapporteur, without change.

42. Mr. KEARNEY said that the word "embodied", while it served a purpose in article 2, subparagraph (*a*), was entirely unnecessary in article C [25].

43. Mr. USTOR (Special Rapporteur) said that deletion of the word "embodied" would not impair the wording of the article in any way.

44. Mr. USHAKOV suggested that it would be possible to use the word "contained", as in article 1.

45. Mr. CALLE Y CALLE said that, in the Spanish text, the principle of non-retroactivity should not be stated in such general terms. The text should specify that the articles applied only to most-favoured-nation clauses

[9] For the discussion of the text originally submitted by the Special Rapporteur, see 1378th meeting.

[10] See *Yearbook... 1974*, vol. II (Part One), p. 268, document A/9610/Rev.1, chap. II, sect. D.

[11] For the discussion of the text submitted by the Special Rapporteur, see 1379th meeting.

contained in treaties: *sólo se aplicarán a las cláusulas de la nación más favorecida contenidas en los tratados....*

46. The CHAIRMAN said that the necessary change would be made in the Spanish text. The Special Rapporteur had agreed to Mr. Kearney's suggestion and, if there were no further comments, he would take it that the Commission agreed to approve the article with those amendments.

*It was so agreed.*

ARTICLE D [12] [26] (Freedom of the parties to agree on different provisions)

47. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article D [26]:

***Article D* [26]. *Freedom of the parties to agree on different provisions***

**The present articles are without prejudice to the provisions which the granting State and the beneficiary State may agree to, regarding the application of the most-favoured-nation clause, in the treaty containing the clause or otherwise.**

48. He reminded the members of the Commission that, at its twenty-seventh session, the Commission had indicated that it would consider whether it would be advisable to introduce an article on the residuary nature of the draft articles as a whole or to adopt the method of introducing, in individual articles, the words "Unless the treaty otherwise provides or it is otherwise agreed".[13] That was why those words had been placed in square brackets in article 16, as adopted in 1975. In paragraph 30 of his seventh report, the Special Rapporteur had proposed adding an article D entitled "Freedom of the parties to draft the clause and restrict its operation" (A/CN.4/293 and Add.1, chap. I, sect. 9). During the discussions on that draft article in the Commission and in the Drafting Committee, divergent opinions had been expressed on the question whether the present articles applied to treaties containing most-favoured-nation clauses providing for exceptions or limitations *ratione personae*, in other words, stipulations to the effect that, although most-favoured-nation treatment was accorded by the granting State to the beneficiary State, the treatment which the granting State extended to one or more specified third States, or to a group of States, must not be taken into consideration in determining whether or not there was most-favoured-nation treatment. In drafting article D [26], the Drafting Committee had taken as a starting-point the first sentence of article D as originally proposed by the Special Rapporteur. As several members of the Commission had pointed out during the discussion of that article, the second sentence seemed to be mainly explanatory and superfluous in the text of such an article. In the opinion of several members, that sentence went too far. The present text of article D [26] however, did differ from the first sentence of the original text, in that the limitation "regarding the application of the most-favoured-nation clause" had been added. Most of the members of the Drafting Committee had considered that, as it now stood, the article did not preclude the application of the present draft articles to clauses including restrictions *ratione personae*, but it had also been said that such clauses were still not covered by the draft articles in their present form, in spite of the addition of article D [26]. That being so, the Drafting Committee understood that the Special Rapporteur intended to record, in the commentary to article D [26], the various views expressed on that matter. The title of the article had been amended and read simply: "Freedom of the parties to agree on different provisions".

49. Lastly, the adoption of article D [26] had made it unnecessary to include the words "Unless the treaty otherwise provides or it is otherwise agreed" at the beginning of article 16. The Drafting Committee had therefore decided to delete them.

50. Mr. YASSEEN asked why the English verb "to agree" had been translated into French by two different verbs—"*s'entendre*", in the title, and "*convenir*", in the text of the article. He believed, moreover, that the freedom of the parties extended to all the provisions of the clause, not only to those regarding its application.

51. Mr. USTOR (Special Rapporteur) replied that there was very little uniformity in the drafting of most-favoured-nation clauses, which ranged from straightforward statements to highly complex stipulations. As noted in the Commission's report on its twenty-seventh session there was no such thing as the most-favoured-nation clause: every treaty required independent examination.[14] The purpose of article D [26] was to state that the rules were not rules of *jus cogens* and that, consequently, the parties were free to agree to provisions otherwise than in the manner specified in the draft. The slight difference of opinion regarding the meaning of the article would be reflected in the commentary.

52. Mr. USHAKOV observed that the difficulty mentioned by Mr. Yasseen arose only in the French text. In the English text, the word "agree" was used both in the title and in the body of the article.

53. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said that the drafting point raised by Mr. Yasseen was simply a matter of translation. The French text needed to be adapted to the English original. With regard to the substantive question, he pointed out that the word "application" had not appeared in the original text and had been added by the Drafting Committee for the sake of precision.

54. Mr. KEARNEY suggested that Mr. Yasseen's misgivings might be dispelled if the word "application" was replaced by the word "scope".

55. Mr. SETTE CÂMARA said it might be better simply to delete the words "the application of".

56. Sir Francis VALLAT said that deletion of the word "application" or the use of a word like "scope" would raise difficulties that should be avoided at the present stage. In the Drafting Committee, he had proposed that

[12] For the discussion of the text originally submitted by the Special Rapporteur, see 1379th and 1380th meetings.

[13] See *Yearbook... 1975*, vol. II, pp. 119-120, document A/10010/Rev.1, para. 117.

[14] *Ibid.*

article 2, subparagraph (*d*) should be supplemented by some phrase such as "except any State that may be excluded by agreement between the granting and the beneficiary States". He had withdrawn that proposal on the understanding that the present article would incorporate the phrase "regarding the application of the most-favoured-nation clause". If that phrase was to be weakened by an amendment, he would feel compelled to reintroduce his earlier proposal concerning article 2, subparagraph (*d*). In its present form, article D [26] in some measure accommodated the views of both sides—a point that would be clearly stated in the Commission's report.

57. In the English text, the commas could be eliminated by recasting the article to read: "... without prejudice to the provisions to which the granting State and the beneficiary State may agree regarding the application of the most-favoured-nation clause in the treaty...". Similarly, the title could be re-worded: "Freedom of the parties to agree to different provisions".

58. Mr. CALLE Y CALLE said that, as originally submitted by the Special Rapporteur, the title of article D had referred to the freedom of the parties to restrict the operation of the clause. The original article had also included a somewhat complex provision whereby the parties could, in particular, withhold from the beneficiary State the right to treatment extended by the granting State to a specified third State or States, or to persons and things in a determined relationship with such States, or to most-favoured-nation treatment in respect of a specified subject-matter. In order to obviate the many difficulties raised by that provision, the article proposed by the Drafting Committee simply used the phrase "regarding the application of the most-favoured-nation clause". As now worded, the article respected the freedom of the parties to reach agreement on such matters as the clause itself, its scope and its application.

59. Mr. YASSEEN said he could agree to the replacement of the word "application" by the word "scope", suggested by Mr. Kearney.

60. Mr. USHAKOV observed that it was very difficult to amend the text of the article at the present stage, since it would mean reopening the discussion that had taken place in the Drafting Committee.

61. Mr. YASSEEN said he would not press the point.

62. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve article D [26] as proposed by the Drafting Committee.

*It was so agreed.*

ARTICLE 21 *bis*[15] [27] (The relationship of the present articles to new rules of international law in favour of developing countries)

63. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said that the Drafting Committee proposed the follwing text for article 21 *bis* [27]:

***Article 21* bis [27]. *The relationship of the present articles to new rules of international law in favour of developing countries***

**The present articles are without prejudice to the establishment of new rules of international law in favour of developing countries.**

64. At the present session, chapter II of the Special Rapporteur's seventh report entitled "Provisions in favour of developing States" had been considered by the Commission at some length. In the light of the Commission's discussions, the Drafting Committee had decided that it was not in a position to include in the draft any articles other than article 21 containing provisions in favour of developing countries, until the practices and policies of States and of the international community were more precise and better known, particularly those that might result from the decisions of competent organs such as UNCTAD. The Drafting Committee had nevertheless considered that it was important to show that the Commission was fully aware of the legitimate concerns of the developing countries, that it understood them and that it reserved its position as to the future development of law on the subject. The Drafting Committee had accordingly adopted article 21 *bis*, which provided that the present articles were without prejudice to the establishment of new rules of international law in favour of developing countries. The title of the article indicated its purpose, namely: "The relationship of the present articles to new rules of international law in favour of developing countries".

65. Mr. KEARNEY said that, since the law was impartial, it might be advisable to replace the words "in favour of" by a more suitable form of words.

66. Mr. YASSEEN said he thought the expression "in favour of developing countries" should be retained, because the rules referred to really were rules in favour of those countries. On the other hand, he wondered whether the word "establishment" was appropriate, since it applied to conventional law, but not to custom, and the new rules might well derive from custom. The word "establishment" should therefore be replaced by another word, such as "supervention".

67. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said that the Drafting Committee had discussed the word "establishment" at length and had not found anything better.

68. Mr. USTOR (Special Rapporteur) said that the Drafting Committee had decided to use the word "establishment" because it covered developments in customary law and the adoption of conventional rules. He was, of course, fully prepared to accept a better term.

69. With regard to the point raised by Mr. Kearney, it would be noted that there was a difference between the establishment of new law and the "establishment of new rules of international law". For the reasons given by Mr. Yasseen, it would be preferable to retain the words "in favour of".

70. Mr. YASSEEN said that, if the word "establishment" was retained, it should be emphasized in the commentary that the article covered not only the creation of conventional rules, but also the formation of customary rules.

[15] See 1386th meeting, paras. 37-43 and 1387th meeting.

71. Mr. AGO said that, as Mr. Yasseen had pointed out, new rules in favour of developing countries could, indeed, be created either by convention or by custom. But he did not see how the adoption of a convention could arrest the development of custom.

72. Mr. TSURUOKA said he thought that the word "establishment" covered the supervention of new customary rules; but it was usually through the adoption of conventions that new rules came into being.

73. Mr. USHAKOV noted that article 5 spoke of "treatment accorded by the granting State ... to persons or things in a determined relationship with that State", but also of "treatment extended by the granting State ... to persons or things in the same relationship with a third State". Article 7 also referred to "treatment extended ... to persons or things in a determined relationship with a third State". In his opinion, the words "a third State" should, in each case, be "that State". The matter was of some importance for translating the text into Russian.

74. Sir Francis VALLAT agreed that the matter was important, but precisely because the words "a third State" might well signify a different State. The same State was not necessarily involved in each case. The point could best be considered by the Drafting Committee.

75. Mr. USHAKOV said that there was no immediate difficulty. The problem could be examined during the second reading of the draft articles.

76. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve article 21 *bis*.

*It was so agreed.*

RESOLUTION ADOPTED BY THE COMMISSION

77. The CHAIRMAN, speaking as a member of the Commission, said that the Special Rapporteur had decided not to stand for re-election to the Commission. In many years of long friendship, he had always admired the scholarship and ability of Mr. Ustor, a man who combined wisdom with humility. It had been a very great pleasure to know him and work with him, for he was an outstanding member of the Commission and had made a great contribution not only to the work of the Commission itself, but also to the cause of international law during a difficult period in international relations.

78. In appreciation of the work of the Special Rapporteur, he wished to submit the following draft resolution:

*The International Law Commission,*

*Having adopted* provisionally the draft articles on the most-favoured-nation clause,

*Desires to express* to the Special Rapporteur, Mr. Endre Ustor, its deep appreciation of the outstanding contribution he has made to the treatment of the topic by his scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion its first reading of the draft articles on the most-favoured-nation clause.

79. Mr. TABIBI proposed that the draft resolution should be co-sponsored by all the members of the Commission.

*It was so agreed.*

*The draft resolution was adopted by acclamation.*

80. Mr. USTOR (Special Rapporteur) said that he was very touched. His ten years as a member of the Commission had been a great experience and had strengthened his belief that friendship could exist despite differences of creed, colour and origin. He was particularly pleased that it had been possible to complete the first reading of the draft articles on the most-favoured-nation clause and hoped that it would be possible to conclude the codification of the topic later. The resolution adopted by the Commission was something in which he took great pride.

*The meeting rose at 5.15 p.m.*

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## 1405th MEETING

*Tuesday, 13 July 1976, at 3.10 p.m.*

*Chairman:* Mr. Abdullah EL-ERIAN

*Members present:* Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

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### Succession of States in respect of matters other than treaties (*concluded*) * (A/CN.4/292, A/CN.4/L.251)

[Item 3 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the draft articles proposed by that Committee (A/CN.4/L.251), beginning with the new subparagraph (*f*) of article 3.

ARTICLE 3 (Use of terms), subparagraph (*f*)

2. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said that the new subparagraph (*f*) proposed for article 3 read as follows:

***Article 3. Use of terms***

**[For the purposes of the present articles:**

**...]**

**(*f*) "newly independent State" means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible.**

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* Resumed from the 1400th meeting.