Document:-

A/CN.4/L.229 and Corr.1

Draft articles on the most-favoured-nation clause - new article proposed by Mr. Reuter - reproduced in A/CN.4/SR.1342

Topic:

Most-favoured-nation clause

Extract from the Yearbook of the International Law Commission:-

1975, vol. I

51. It would also be necessary to introduce a provision to prevent a developed country from benefiting from a system of preferences indirectly, by invoking its most-favoured-nation clause with a developing country which had itself secured the benefit of the system of preferences by invoking a most-favoured-nation clause.

52. With regard to the suggestion that the term "developed State" should be defined, he did not think it was at all desirable to introduce a formal definition of either a "developed State" or a "developing State" into the draft articles themselves. Those terms were in common use in GATT, in UNCTAD and throughout the United Nations family and were well understood by all who participated in the work of international organizations. Some explanation in the commentary was necessary, however, because a State which was a developing State at the present time might well become a developed State by the time the draft became a convention.

53. Article 0 was a necessary provision, which reflected a realistic and sympathetic approach to the promotion of equality and justice in international trade relations, and it had his support.

54. Mr. THIAM said that article 0 was in conformity with the Commission's mandate, which was not only to codify international law, but also to develop it progressively. The substance of the article was acceptable, for it confirmed the now widely accepted need to promote the economic development of developing countries. As to the desirability of defining the expression "developing State", he agreed with Mr. Elias that it would be enough to include an explanation in the commentary without going into too much detail. In itself, the expression "developing State" was not very satisfactory, since all States were developing in so far as they made development plans every year. It would not be advisable to refer to the Group of 77, because the level of development of the States members of that Group varied widely.

55. The expression "generalized system of preferences" was in use in GATT, but it had been criticized by some members of the Group of 77. The developing countries which were associate members of the Common Market, and which considered that the former colonial Powers should grant them certain advantages, were afraid of losing those advantages if they became parties to a generalized system of preferences. Consequently, it would be better to use the expression "any system of preferences", which would apply both to the GATT system and to other systems.

56. The expression "trade advantages" seemed too restrictive. The development of the developing countries should not be considered only from the point of view of trade. Besides, an agreement such as the GATT applied not only to trade, but also to customs tariffs.

57. Unlike Mr. Hambro, who thought the question of customs unions should be dealt with in article 0, he himself considered that it was only after it had studied the substance of that article that the Commission should examine the possible effects of the most-favoured-nation clause on customs unions and free-trade areas.

58. Other articles relating to developing countries were needed to supplement article 0. In particular, there should be a provision stating the rule that a developed State could not claim the treatment accorded by a developing State to another developing State.

The meeting rose at 1.5 p.m.

1342nd MEETING

Wednesday, 2 July 1975, at 10.10 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Elias, Mr. Hambro, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

Most-favoured-nation clause

(A/CN.4/266;[1] A/CN.4/280;[2] A/CN.4/286; A/CN.4/L.228/Rev.1)

[Item 3 of the agenda]

(continued)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 0 *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of article 0 and drew attention to the revised text submitted by the Special Rapporteur (A/CN.4/L.228/Rev.1), which read:

> "A developed beneficiary State is not entitled under a most-favoured-nation clause to the right to trade advantages accorded on a non-reciprocal basis by a developed granting State within its generalized system of preferences to a developing third State."

2. Mr. TAMMES said that the principle underlying article 0 had been known to the Commission from the beginning of its work on the most-favoured-nation cause in 1968. The Special Rapporteur's initial working paper on the topic had mentioned the interests of developing countries as an exception to the operation of the most-favoured-nation clause, and quoted a very significant passage from the proceedings of the Second Session of UNCTAD, which read: "The traditional most-favoured-nation principle is designed to establish equality of treatment ... but it does not take account of the fact that there are in the world inequalities in economic structure and levels of development; to treat equally countries that are economically unequal, constitutes equality of treatment only from a formal point of view but amounts actually to inequality of treatment".[3]

3. The need for exceptions and preferences which followed from that recognition of the existing situation had been frequently restated since then, most recently in

[1] *Yearbook ... 1973*, vol. II, pp. 97-116.

[2] *Yearbook ... 1974*, vol. II, Part One, pp. 117-134.

[3] *Yearbook ... 1968*, vol. II, p. 169, para. 28 and foot-note 35.

the Charter of Economic Rights and Duties of States adopted by the General Assembly in 1974.[4] It was therefore only natural that the Commission should now be considering an exception which appeared to have entered the general legal conviction of peoples—a conviction that was the only basis on which the Commission could present a rule of progressive development of international law.

4. At that point, two worlds met: the familiar world of the law of treaties, from which the present draft articles were derived, and the more dynamic world of international economic law, which had a different language and philosophy. That encounter had produced a proposal which gave grounds for some concern as to how such an expression as "generalized system of preferences" would be interpreted by national courts unfamiliar with the concept. He had been reassured on that point, however, when he had noted that that expression had found its way into the internal law of his own country through the incorporation of certain EEC regulations.

5. A serious difficulty was that article 0 dealt with a class of subjects of international law which was by definition ephemeral, since the very purpose of the article was to help eradicate under-development so that the category of developing States would disappear.

6. A more serious difficulty was that individual developing States might leave that category within a relatively short time, as a consequence of some unexpected change such as the discovery of new resources. Awkward problems of interpretation relating to time and substance would then arise. Should the interpreter go to the United Nations to ascertain whether, in a particular case, a claim based on the most-favoured-nation clause could still be sustained? Development was a gradual process which did not lend itself readily to the application of an objective criterion, such as *per capita* income, which could be applied by a court of law.

7. The Special Rapporteur had drawn attention to a comparable exception for the benefit of developing countries to be found in article 2, paragraph 3 of the International Covenant on Economic, Social and Cultural Rights, adopted by the General Assembly in 1966.[5] That provision permitted developing countries to determine to what extent they would guarantee to non-nationals the economic rights recognized in the Covenant. The Covenant, however, was not yet in force, so that there was no experience showing how national courts had handled that exception, which was comparable to the one provided for in article 0.

8. He shared Mr. Sette Câmara's concern over the question whether the effect of article 0 should be limited entirely to trade. As he saw it, the draft articles as a whole were intended to have general application to all sorts of benefits. Moreover, the idea behind article 0 was general: it was designed to remove or eradicate intolerable inequalities, and should apply to other things than trade—for instance, scientific and technical information. Article 13, paragraph 1, of the Charter of Economic Rights and Duties of States[6] provided that "Every State has the right to benefit from the advances and developments in science and technology for the acceleration of its economic and social development". In the light of that provision, access to information on science and technology appeared to be another matter that should be protected from the automatic operation of the most-favoured-nation clause.

9. He agreed with those members who thought that article 0 should be only the first of a series of special articles which he hoped would be submitted to the Commission at its next session.

10. Mr. RAMANGASOAVINA observed that for some time, and particularly since articles 8 and 13 had been considered, several members of the Commission had been urging the need to provide for greater flexibility in, or exceptions to, certain rules which they considered to be correct, but too strict for developing countries. The problems of those countries had caused concern to international bodies such as GATT and UNCTAD, and they had not been evaded by the Special Rapporteur, who had dealt with them in his sixth report (A/CN.4/286). Draft article 0, which would be followed by other articles relating to developing countries, seemed to meet that concern. Several members of the Commission had already stressed the merits of the article and observed that the international community had become aware of the need for solidarity between developed and developing countries, as a means of speeding up the development of the latter.

11. Article 0 should have a special place in the draft because it was a transitional provision. Studies by GATT and UNCTAD showed that the generalized system of preferences would be limited in duration, so that even if under-development continued for a long time yet, the only purpose of article 0 would be to deal with a temporary situation.

12. As he understood it, the expression "generalized system of preferences" meant all the trade arrangements —including arrangements relating to customs tariffs— designed to facilitate marketing of the products of the developing countries. The purpose of article 0 was to provide some protection for the developing countries on the world market. It was obvious that the prohibition contained in the provision applied only to developed countries; it could not prevent a developing country linked to a developed country by a most-favoured-nation clause from invoking that clause, merely because the developed country had special ties with other developed countries, within the Common Market, for example.

13. Article 0 was the outcome of the Special Rapporteur's study of the work of international bodies. In paragraph 74 of his sixth report, he had referred to the Charter of Economic Rights and Duties of States, article 18 of which provided that "Developed countries should extend, improve and enlarge the system of generalized non-reciprocal and non-discriminatory tariff preferences to the developing countries consistent with the relevant agreed conclusions and relevant decisions as adopted on

[4] General Assembly resolution 3281 (XXIX).

[5] See 1335th meeting, para. 53.

[6] See General Assembly resolution 3281 (XXIX).

this subject . . .". Article 0 was perfectly in keeping with that provision.

14. However, another provision of that Charter, article 21, stipulated that "Developing countries should endeavour to promote the expansion of their mutual trade and to this end may, in accordance with the existing and evolving provisions and procedures of international agreements where applicable, grant trade preferences to other developing countries without being obliged to extend such preferences to developed countries . . .". That provision, which applied to relations between developing countries, should be covered by another rule, whereby a developed State could not, as the beneficiary of a most-favoured-nation clause, claim the treatment accorded by a developing country to another developing country under a generalized system of preferences, within a regional organization or a customs union. The establishment of regional organizations, which were a form of co-operation supported by GATT and UNCTAD, should be encouraged.

15. Mr. USHAKOV said that article 0 was acceptable, but it seemed strange to be considering an exception to the general rules before they had been definitely established.

16. The term "developing countries" was difficult to define, either in the present context or in the context of international relations in general.

17. With regard to the exceptions which some members of the Commission would like to make in favour of customs unions and free-trade areas, he did not think they followed from any rule of international law. If the existence of such exceptions could be proved, the Commission should try to clarify the concepts of a customs union and a free-trade area, though in view of their great variety it would be extremely difficult to do so. He would therefore prefer that any questions raised by the existence of customs unions or free-trade areas should continue to be governed by practice.

18. Mr. ŠAHOVIĆ said that article 0 gave the Commission an opportunity to take up a basic question on which the success of its work on the most-favoured-nation clause depended. That question had some non-legal aspects and made it necessary to consider the historical role of the most-favoured-nation clause in the development of international economic and political relations. Since the discussions on the most-favoured-nation clause had begun, some members of the Commission had urged that the modalities of its application should be adapted to economic and political realities, particularly in regard to developing countries. The clause was one of the principal instruments of international trade, but it was characteristic of an international market based on a capitalist economy. Of course, that did not mean that it was going to disappear in the relatively near future, but it was undeniable that, in the interests of most of the members of the international community, the conditions for application of the clause should be changed in order to improve the situation of the developing countries. And to ensure the success of the Commission's work on the subject, the largest possible number of States should be able to support it.

19. Article 0 and the articles which would supplement it could either provide for exceptions to the general rules, or confirm the duality of the rules applicable in trade and economic matters. As a first step, the Commission should decide what those articles were to contain, so that the Special Rapporteur would know what direction to follow in his future work. In his sixth report, he had proposed drafting several provisions concerning developing countries, but he had finally confined himself to only one. It should now be decided which aspects of the situation of developing countries were to be taken into consideration and whether article 0 was sufficient to meet their needs. There were three problems: the relationship between the clause and developing countries, the relationship between the clause and organizations of developed countries, and the system of preferences, which might or might not be generalized. On that last point, it was essential to emphasize the non-discriminatory nature of generalized systems of preferences.

20. The question of customs unions and free-trade areas had been gone into very thoroughly by the Special Rapporteur in his sixth report. He had reached the conclusion that there was no customary rule of international law which allowed exceptions to the application of the most-favoured-nation clause in favour of customs unions or free-trade areas. There might be further development, however, and the Commission should not lose sight of that question. He agreed with the Special Rapporteur's conclusion. The question of customs unions and free-trade areas should be dealt with in the commentary or in the Commission's report to the General Assembly, so that the General Assembly might have a discussion on it, which would probably be very helpful to the Commission.

21. Mr. BILGE said that all the members of the Commission seemed to agree that article 0 met a need—the need to correct the inequality between developed and developing countries; their differences of opinion related only to the scope of the exception provided for in the article. In the commentary, the inequality between developed and developing countries was presented as a temporary phenomenon, but in fact it was impossible to say how long it would last. Moreover, if the measures taken to cure under-development proved ineffective, they would probably become permanent. For about 20 years, the international community had been trying to discover the causes of under-development, but its efforts had not yet been successful. The diversity of the measures successively recommended seemed to suggest that the phenomenon would continue for a long time to come. After confining itself to financial assistance, the international community had decided to provide the developing countries with technical assistance, then to improve their economic infrastructure and, finally, to improve their social infrastructure.

22. The rule stated in article 0 would have the effect of transforming into a legal obligation an intention of the developed States, namely, the intention not to claim the benefit of a most-favoured-nation clause in a specific case. The purpose of the provision was thus to establish confidence between developed and developing countries. That exception in favour of developing countries was

clearly only one measure, among others, calculated to remedy under-development.

23. With regard to the definition of developing countries, which were to be the beneficiaries of article 0, the Commission should content itself with the terminology employed in the United Nations and the specialized agencies. For about ten years groups of experts had been trying to draw up a functional definition of the concept, but that was not a task for the Commission.

24. The main difficulty with article 0 lay in its very limited field of application, which did not match the objectives listed by the Special Rapporteur in his sixth report, namely, to increase the export earnings of the developing countries, to promote their industrialization and to accelerate their rates of economic growth (A/CN.4/286, para. 66, I, 2). The exception in article 0 was limited strictly to trade. Moreover, it should be noted that reduction of customs tariffs was becoming less important, since the international community was moving towards the elimination of customs duties. It was therefore to be feared that a provision of such limited scope as article 0 would disappoint the developing countries. Without going to the other extreme, the Commission should perhaps consider making the provision rather broader. Like the other articles relating to the most-favoured-nation clause, article 0 might apply to matters other than trade. It would, however, be necessary to ensure that such an enlargement of its scope did not discourage developed States from granting benefits to developing countries within a generalized system of preferences.

25. Mr. USTOR (Special Rapporteur) said that after the discussion which had taken place, he thought it desirable to clarify the nature of the provision under study.

26. It was not the Commission's task to deal with the whole question of developing countries. All it could do was to discern the kind of rules that were being evolved in regard to those countries in United Nations bodies and elsewhere. It should examine the special benefits which were being granted to developing countries and determine on what types of benefit there was general agreement among States. If the Commission found that there was general agreement to grant certain special rights to developing countries, it should formulate a legal rule establishing the entitlement to those rights.

27. He believed there was general agreement among States that every developed State should accord the benefits of a generalized system of preferences to the developing countries. As he saw it, that right existed only in trade and customs matters; there was no basis in State practice for admitting any other exception to the operation of the most-favoured-nation clause. Though personally in full sympathy with the cause of the developing countries, he could not propose rules which went beyond what had been accepted by the appropriate economic bodies.

28. Mr. QUENTIN-BAXTER said he admired the careful preparatory work done by the Special Rapporteur in his sixth report on the questions both of developing countries and of economic unions, and his presentation of an article which, whatever its ultimate destiny, was the perfect vehicle for an essential discussion on those subjects. He was particularly grateful to the Special Rapporteur for having emphasized the modesty of the role the Commission could play in relation to the needs of poor countries. Any suggestion that the Commission's drafts could redress the balance, or change the character of the old rules relating to the most-favoured-nation clause, was bound to lead to regrettable false expectations and misunderstandings.

29. Since other speakers had drawn attention to the limited character of the article, he would only point out that the system it proposed was in the hands of the developed States. Being familiar with the economic problems of small Pacific islands, which needed special rules to ensure that their limited output found a market, he had the objectives of the article very much at heart; it was clear, however, that the discretion left to the developed countries might lead them to apply the proposed system principally for their own benefit. Thus the article was merely an instrument which could be of use.

30. Again as other speakers had said, the concept of what was a developing country and what was a developed country changed as rapidly as the world situation. Consequently, the forward-looking part of the draft articles might soon seem out of date than those rules relating to the clause which had been derived from centuries of practice.

31. He also wondered about the place of the proposed rule in the draft. It had been said that the rule did not come within the sphere of *jus cogens*, that the Commission was not seeking to override the right of States to contract with others as they wished or challenging the *pacta sunt servanda* rule, but it would be unacceptable for the final version of the article to begin "Unless otherwise agreed . . .". The value of the article was, he supposed, that it would be accepted as a rule from which States would not wish to derogate. If the Commission saw the article merely as another aid to interpretation, its inclusion might contribute to the promotion of a benevolent principle, or merely draw attention to the weakness of the Commission's position. He was reminded of the example mentioned by Mr. Pinto of provisions which were ultimately governed by words such as "appropriate" and necessary". [7]

32. He was sure of one thing, namely, that if the Commission's draft was to become part of codified law, it must have integrity. That was to say, it must be honestly founded on State practice and on the Commission's perceptions of organized world opinion, and it must be of one piece, rather than a set of rules and a set of exceptions. He was very chary of making sharp distnctions between the codification and development aspects of the draft—between the elements which had their origins in treaty law and development law respectively. The Commission should submit to the General Assembly a set of articles with a single, consistent, well-founded theme, not a set of tight rules counterbalanced by broad exceptions. He would be very nervous about the ultimate success of the Commission's efforts if consideration of the problems of developing countries led to the conclusion of special

[7] See previous meeting, para. 41.

exceptions for economic unions. In his view, the splendid work done by the Special Rapporteur provided a basis broad enough for the Commission to suggest to the General Assembly, and particularly to the representatives of developing States, basic propositions which should command their attention and perhaps their approval.

33. The Commission's findings on the most-favoured-nation clause were consistent with the conclusions it had reached on the relationship between the sovereignty and the international obligations of States when discussing other subjects. Time and time again, and most recently in connexion with State succession in respect of matters other than treaties, the Commission had had to ensure that obligations were placed in their proper context and did not constitute infringements of State sovereignty. In the case of a most-favoured-nation clause, the agreement was always drafted in a certain climate of expectation and within definite limits, so that when a change occurred so profound that it went beyond the scope of the matters agreed upon, it was generally understood that most-favoured-nation treatment agreements would not constitute a restraint on the ordinary freedom of States to develop in various ways. That being so, it seemed to him that both practice and sense of what was reasonable suggested that, when a State entered an economic union, obligations more limited than those it incurred thereby must yield to negotiation and amendment. It also seemed that understandings between parties to arrangements such as the GATT would normally be incorporated in any arrangements made by those States under the kind of generalized system of preferences referred to in draft article 0.

34. Consequently, the first step to be taken in submitting the venerable institution of the most-favoured-nation clause to the General Assembly was to say that the ideas on which it was based and which it contained were fully in harmony with modern thinking on the relative positions of State sovereignty and the obligations States assumed towards each other in everyday life.

35. The second step was to point out that, whatever its limitations and whatever the extent to which it had been overtaken by other economic rules and formalized multilateral negotiations, there were still fields in which the most-favoured-nation clause offered the less developed nations a chance to achieve a certain status. While that often implied no more than the right to participate in negotiations, the fact that under the clause developing countries always had a certain claim to have their views taken into account was extremely important. If it was clear that commitments under a most-favoured-nation clause must be amended if an economic union was formed—a fact which should be stated as a consequence of, not as an exception to, the Commission's rules—it was also beyond doubt that the beneficiary States had a right to be heard on such an occasion and to seek to preserve their own interests as far as possible.

36. If, as a third step, the Commission could point out the main difficulties and choices to which the extensive ramifications of the most-favoured-nation clause gave rise, the draft articles would be useful to small States which lacked the resources to engage in elaborate research and which might need a reminder that the clause faced them with primary choices likely to have important consequences.

37. By following such a course, the Commission would place the most-favoured-nation clause, which by and large had served the world well, in a modern context. He was particularly wary of attempts to gain favour for the draft articles by stating principles which in themselves must be popular. While the principle stated in article 0 was in itself harmless, danger could arise if States were allowed to believe that it, or anything else the Commission adopted by way of exceptions, could radically alter the balance of the whole draft. Members of the Commission should bear in mind the difficulty of attracting parties to multilateral conventions. There were situations in which there would be overwhelming approval of the inclusion of a certain principle in a treaty, simply because it was of the kind which commanded general international support, but in which, when it came to ratification of the instrument, States would seriously reconsider their positions, finding a provision which had been of value as a demonstration of international solidarity to be empty as an international obligation.

38. For those reasons, he reserved his position on the value of article 0 as currently proposed, and on the inclusion of further exceptions in the draft.

39. Sir Francis VALLAT said he wished to make it quite clear at the outset that he was fully in favour of the idea underlying article 0. Nonetheless, he was filled with doubt and concern at the thought that the Commission had left an area of work in which it had dealt with legal principles and entered a new field where it was surrounded by economic and political problems and was on unstable ground. He had feeling that, under the guise of working towards the codification and progressive development of international law, members of the Commission were vying with each other to gain or preserve economic and political advantages, and he very much doubted whether that was the Commission's true function.

40. There was no general agreement, no practice or *opinio juris* on the basis of which the principle in article 0 could be seen as a general rule. What the Commission was proposing pertained to the progressive development of international law, but he had grave doubts as to whether the bases for the proposal were solid enough for the purposes of codification. The document on which the Special Rapporteur had relied most heavily, the Agreed Conclusions of the UNCTAD Special Committee on preferences (A/CN.4/286, para. 66), referred to a system that was to be reviewed after ten years. Since that system had been instituted in 1970, the review would take place at the very moment when the Commission could first hope that its draft articles would enter into force. Moreover, in section IX, paragraph 2, of the agreed conclusions, UNCTAD itself had emphasized the mobile, transitional character of the very concept on which the Commission had based its draft article. If the Commission did wish to make a rule based on something the economic and political world was likely to replace in five years' time, in order to avoid confusion it might be wise to use the language employed by UNCTAD.

41. There could be no absolute answer to the question whether a particular country was a developing country or not; everything depended on the relations between States, since a country might be considered developed by comparison with one country and still developing by comparison with another. That view was confirmed by the reference in paragraph 70 of the Special Rapporteur's sixth report to a preferential tariff scheme operated by Hungary, under which the test applied for the granting of preferences not only discriminated on a geographical basis, but relied on the relationship between the *per capita* national income of a developing country and that of Hungary itself. While he was delighted that Hungary should feel able to consider itself a developed country, he wondered whether it would wish to do so in all circumstances. Similarly, it was possible that certain States in Africa, for example, might be happy to accord preferences to other countries, but would themselves feel entitled to claim similar treatment from, for example, States in Europe.

42. He had called attention to the difficulty of defining the concept of a "developing country" for two reasons. The first was that the Commission should be careful lest, by using the term in a loose sense, it opened the back door to another kind of discrimination, as was entirely possible. While he agreed that there was no need for a formal definition of the term, the Commission must describe what it meant. It must employ in the commentary a common standard which would be objective, not a kind of sliding scale; and if the criterion was to be the comparison of some elements of the systems of the beneficiary and granting States, that should be stated in the article.

43. The second reason concerned the scope of the article. Given its historical background, the phrase "generalized system of preferences" clearly referred to a system under which one State would be granted lower customs tariffs than another. That, however, was very different from the concept of "trade advantages", which could take widely differing forms. It was more a matter of drafting than anything else, but as it stood, article 0 did seem to subject the broader concept of trade advantages to the limitations of the generalized system of preferences. If the Commission wished to refer to "trade advantages" as such, it would have to consider further just what the phrase meant and what standards would be applied.

44. In the light of the discussion, he feared that he would be misunderstood if he did not refer to the question of customs unions and free trade areas. He agreed with Mr. Hambro that that question was, in a sense, linked with the question of developing countries, as indeed it had been in the 1969 resolution of the Institute of International Law reproduced in the annex to the Special Rapporteur's fourth report. [8] At the same time, it fell into a different category; for the Commission was trying to find, within the context of the most-favoured-nation clause, generally agreed means of guaranteeing certain kinds of advantages to developing countries, and that, it must be admitted, was a quasi-political objective. The question of economic unions, on the other hand, was essentially a legal matter, involving the relationship between the members of an association and their respective obligations under most-favoured-nation clauses. Hence it was not a matter to be covered by an exception, but a basic legal question which must be dealt with in the draft articles.

45. If the Commission made its draft articles so inflexible that there was no room for economic unions to exist side by side with the most-favoured-nation clause, it would have to rethink the entire project; for there was little doubt that, since the majority of States now found economic unions necessary to ensure their economic viability, the most-favoured-nation clause would disappear. The problem, then, was to draft the articles in such a way that when benefits were so closely integrated with an institution that they really ceased to be separate benefits, they would not fall within the scope of the ordinary most-favoured-nation clause.

46. Mr. AGO said that he was very much aware of the increasingly urgent need for a more effective solidarity among the members of the international community. He was becoming more and more convinced that it was imperative for the rich countries to make a genuine effort to narrow the growing gap between them and the poor countries. Like the Special Rapporteur, he was also convinced that something could be done in that direction even in the specific context of the most-favoured-nation clause; for if a more developed State decide to grant benefits to less developed countries with a view to achieving the general objective he had mentioned, it would be wrong for another rich State to profit thereby indirectly merely because, in its relations with the State in question, it happened to be the beneficiary of a most-favoured-nation clause.

47. Nevertheless, he could not help feeling somewhat troubled by the rule stated in article 0. First, the article made use of a number of notions and institutions which were not precisely defined, and which had implications in fields where lawyers were not always competent to express an opinion. Secondly, the actual notions of a "developed country" and a "developing country" were vague and the meaning of those expressions varied with the angle from which they were viewed, the context and the time. The distinction formerly made between rich countries and poor countries no longer corresponded to present conditions; developed countries were not necessarily rich, nor were under-developed countries necessarily poor. The Special Rapporteur had understood that if the expression "developing country" was given too broad a meaning, the system of the most-favoured-nation clause and its development possibilities might be very seriously impaired.

48. The Special Rapporteur had therefore himself adopted what he considered a more specific criterion: that of generalized systems of preferences. Those systems varied, however, and might even cease to exist. They were primarily "national" preference schemes which might have results that did not really meet the historical need article 0 was intended to satisfy. Consequently, he wondered whether, by referring to generalized systems of preferences, the Commission would achieve its objective, or whether it would only be codifying systems of

[8] *Yearbook ... 1973*, vol. II, p. 116.

preferences based on certain national interests, rather than on the general interest of the international community and its least privileged members.

49. Mr. REUTER proposed a new article which read:

"None of the provisions of these articles prejudices:

"(1) the special régimes which may prevail in the relations among developing countries and in the relations between developing and developed countries;

"(2) the construction to be placed on a most-favoured-nation clause in the case of regional régimes limited to certain countries forming part of a particular economic or political union."

The meeting rose at 1 p.m.

1343rd MEETING

Thursday, 3 July 1975, at 10.20 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

Most-favoured-nation clause

(A/CN.4/266;[1] A/CN.4/280;[2] A/CN.4/286; A/CN.4/L.228/Rev.1, L.229 and Corr.1)

[Item 3 of the agenda]

(continued)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 0[3] *(continued)* AND

NEW ARTICLE PROPOSED BY MR. REUTER[4]

1. The CHAIRMAN invited Mr. Reuter to introduce the new article he had proposed at the previous meeting (A/CN.4/L.229/Corr.1).

2. Mr. REUTER said that the new article he had proposed was intended to deal with two different questions: that of development and that of the relationship between the most-favoured-nation clause and certain special regional agreements. There were two separate matters and they were dealt with in two independent paragraphs, so that the Commission could very well drop one and keep the other. The two questions had certain aspects in common, but the mere fact that paragraph 1 dealt with the special régimes which might prevail in relations between developing countries made paragraph 2 superfluous so far as those countries were concerned.

3. In submitting a fairly general and quite brief provision he had had two kinds of consideration in mind, the first of which seemed imperative, since a question of time was involved. For even if the Commission decided to devote the remaining three weeks of the session to questions concerning the most-favoured-nation clause and developing countries, he did not think it would be able to work out a satisfactory text. If it wished to show the General Assembly how much it had that question at heart, it should recognize the existence of certain problems, but adopt a waiting attitude and express a sort of general reservation, leaving open the possibility of reverting to the question later if the General Assembly requested it to do so.

4. That reserved attitude was also justified by considerations of a different kind. For while he appreciated that the bitterness of the developing countries was perfectly legitimate, particularly after 1974, which had been a very disappointing year for them, he hoped the Commission would not have to deal with the legal aspect of the problems of developing countries, regarding which the situation was extremely confused.

5. The law relating to development was still in its infancy, as Mr. Bilge had very rightly said. But if the Commission wished to deal with development problems from the legal point of view, it would have to take a position on the law of development and inquire into its sources. Were those sources to be found in conventions or in a nascent international authority possessed by certain international organizations? Those questions were being hotly contested at the very time when the General Assembly had decided to undertake a review of the Charter. In his opinion, it was the body responsible for studying the review of the Charter which should pronounce on certain questions concerning the sources of the law of development.

6. The definition of the term "developing countries" was also controversial. Some members of the Commission had spoken on that question in other bodies and in other contexts, and had shown that it was absurd to multiply definitions and categories of developing countries. One definition had been proposed for the generalized system of preferences, but it was not necessarily adopted in individual agreements; the agreements with Hungary had been mentioned, but it would be equally appropriate to cite the agreements of the European Communities, which had refused to apply generalized preferences to European developing countries. The United Nations had drawn up a list of the 25 poorest countries, but when it had come to establishing a relief fund for victims of the drought in the Sahel, the number had been increased to 29. Again, when deciding the apportionment of the expenses of the emergency force set up by the Security Council in 1973, the General Assembly had classified developing countries in another way. Thus the definition of the expression "developing country" was a very difficult problem which the Commission was hardly in a position to solve; and it was only one problem among many.

7. He was, of course, only expressing his personal opinion, but he was sure that the text he had submitted would at present be unacceptable to most of the developed countries, for it was based on the premise that the problem of development was not confined to specific economic

[1] *Yearbook ... 1973*, vol. II, pp. 97-116.

[2] *Yearbook ... 1974*, vol. II, Part One, pp. 117-134.

[3] For text see 1341st meeting, para. 1 and 1342nd meeting, para. 1.

[4] For text see previous meeting, para. 49.