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Draft articles on the most-favoured-nation clause: article 21 ter proposed by Mr. Reuter

Topic:
Most-favoured-nation clause

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basis of the Special Rapporteur's sixth⁴⁸ and seventh⁴⁹ reports, the question of exceptions to the operation of the clause in that respect, and recognized the importance of the matter. During its second reading of the draft articles, the Commission re-examined the question in the light of comments of Member States, organs of the United Nations, specialized agencies and other inter-governmental organizations,⁵⁰ on the basis of which the new Special Rapporteur on the topic prepared the report he submitted at the current session (A/CN.4/309 and Add.1 and 2). The Commission also took into account proposals for additional articles submitted during the session.⁵¹

54. As a result of its consideration, the Commission found that the operation of the clause in the sphere of economic relations, with particular reference to developing countries, was not a matter that lent itself easily to codification of international law in the sense in which that term was used in the Statute of the Commission, because the requirements for that process, as described in article 15 of the Statute, namely, extensive State practice, precedents and doctrine, were not easily discernible. The Commission therefore attempted to enter into the area of progressive development and adopted articles 23 and 24. It also adopted article 30, in the hope that further development might take place in that area in the future.⁵²

55. The Commission did not agree on the appropriateness of including, in its final draft, further provisions relating to that aspect of the operation of the clause based on two proposals for additional articles submitted by one member at the current session. It decided instead to bring their texts to the attention of the General Assembly, so that Member States might take them into account, as appropriate, when undertaking the final stage of codification of the topic. The texts of the two proposals are as follows:

Article A. The most-favoured-nation clause and treatment extended in accordance with the Charter of Economic Rights and Duties of States

A beneficiary State is not entitled under a most-favoured-nation clause to the treatment extended by a granting State under an agreement in conformity with the Charter of Economic Rights and Duties of States if the grant of the benefit of the most-favoured-nation clause is contrary to the object and purpose of such an agreement and

(a) if the agreement is open to all member States of the international community and is concluded under the auspices of the United Nations or an organization of a universal character belonging to the United Nations family; or

(b) if the conformity of the agreement with the principles of the charter of Economic Rights and Duties of States is subject to review by an organ of the United Nations or an organization of a universal character belonging to the United Nations family.⁵³

⁴⁸ *Yearbook ... 1975*, vol. II, p. 1, doc. A/CN.4/286.

⁴⁹ *Yearbook ... 1976*, vol. II (Part One), p. 111, doc. A/CN.4/293 and Add.1.

⁵⁰ See annex to the present report.

⁵¹ See para. 44 above.

⁵² See section D below, articles 23, 24 and 30, and commentaries thereto.

⁵³ A/CN.4/L.264.

Article 21 ter. The most-favoured-nation clause and treatment extended under commodity agreements

A beneficiary State is not entitled under a most-favoured-nation clause to the treatment extended by a granting State under an agreement open to all member States of the international community, concluded under the auspices of the United Nations or an organization of a universal character belonging to the United Nations family and the object of which is the economic régime of a commodity, if the grant of the benefit of the most-favoured-nation clause is contrary to the object and purpose of such an agreement.⁵⁴

4. THE MOST-FAVOURLED-NATION CLAUSE IN RELATION TO CUSTOMS UNIONS AND SIMILAR ASSOCIATIONS OF STATES

56. The question whether a most-favoured-nation clause does or does not attract benefits accorded within customs unions and similar associations of States⁵⁵ was dealt with by the Commission in first reading in the course of its twenty-seventh (1975) and twenty-eighth (1976) sessions.⁵⁶

57. At its current session, the Commission re-examined the question on the basis of the first report submitted by the new Special Rapporteur (A/CN.4/309 and Add. 1 and 2) and in the light of the comments of Member States, organs of the United Nations, specialized agencies and other intergovernmental organizations.⁵⁷ The Commission also had before it the text of an additional article proposed by one member. That text reads as follows:

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.⁵⁸

58. As a result of its consideration of the matter, the Commission, bearing in mind the inconclusiveness of the comments made thereon and the lack of time available to it to consider the matter, agreed not to include an article on a customs union exception in the draft articles. It was understood that the silence of the draft articles could

⁵⁴ A/CN.4/L.265.

⁵⁵ In this connexion see, *inter alia*, article XXIV of the General Agreement on Tariffs and Trade (GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No. GATT/169-1), p. 41); article 234 of the Treaty establishing the European Economic Community, signed at Rome on 25 March 1957 (United Nations, *Treaty Series*, vol. 298, p. 3); article XXIV of the Multilateral Treaty of Free Trade and Central American Economic Integration, signed at Tegucigalpa (Honduras) on 10 June 1958 (United Nations, *Treaty Series*, vol. 454, p. 47); and article 12 of the Charter of Economic Rights and Duties of States (General Assembly resolution 3281 (XXIX) of 12 December 1974).

⁵⁶ See *Yearbook ... 1975*, vol. II, pp. 143 *et seq.*, doc. A/10010/Rev.1, chap. IV, sect. B, article 15, paras. (24)-(71) of the commentary, and *Yearbook ... 1976*, vol. II (Part Two), pp. 45 *et seq.*, doc. A/31/10, chap. II, sect. C, article 15, paras. (24)-(39) of the commentary.

⁵⁷ See annex to the present report. The following United Nations organs and intergovernmental organizations referred to the question: ECWA, GATT, EEC, EFTA, LAFTA, the Board of the Cartagena Agreement, the Caribbean Community Secretariat and the League of Arab States.

⁵⁸ A/CN.4/L.267.