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**Draft articles on the most-favoured-nation clause: article 21 bis proposed by Mr. Njenga -
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Topic:
Most-favoured-nation clause

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(<http://www.un.org/law/ilc/index.htm>)*

Yaoundé Convention¹³ had been that it tended to favour a particular group, namely, the former French colonies.) In addition, by virtue of the principle of self-selection, donor countries were entitled to choose not only the beneficiaries but also the products to be covered by the preferences, and they sometimes excluded or set strict limits on imports of the very items in which developing countries held a competitive position, for example, textiles and shoes in the case of the EEC scheme of generalized preferences.

23. Another disadvantage of the GSP was that it applied only to manufactures and semi-manufactures. Paragraph (11) of the commentary pointed out that, according to the report of the Trade and Development Board on its fifth special session, representatives of developing countries had judged that the system was of little or no benefit, since their countries did not produce manufactures or semi-manufactures, but supplied only primary materials and semi-processed agricultural commodities that were not covered by the system. That was clearly a major drawback for developing countries, particularly the countries of Africa and the smaller countries of Asia and Latin America. At the same session of the Board, representatives of developing countries had also observed that the actual benefits of the scheme were still meagre because of the limited coverage, the limitations imposed on preferential imports by ceilings and the application of non-tariff barriers to the products covered.

24. In that connexion, it was essential to take account of the effects of economic unions such as EEC, which were designed to set up a wall against non-members. However, there was a major difference between economic unions of developed countries and those of developing countries. The purpose of economic unions of developing countries was to facilitate development, whereas that of economic unions of developed countries was to expand their markets and to compete with other blocs of developed countries. The barrier thus erected against non-member countries could be lowered to some extent, but it would not be removed, especially in the case of sensitive products. Last, but by no means least, there were the many kinds of non-tariff barriers, which were often more prejudicial than the tariff barriers themselves.

25. He fully endorsed article 21 in its existing form, but thought it should be supplemented by a new article 21 *bis*, which would read:

With a view to promoting the expansion of their mutual trade, developing countries may grant trade preferences to other developing countries in accordance with bilateral or regional arrangements, without being obliged to extend such preferences to developed countries on the basis of the most-favoured-nation clause. Such arrangements shall not constitute an impediment to general trade liberalization and expansion.¹⁴

¹³ Convention of Association between the European Economic Community and the African and Malagasy States associated with that Community.

¹⁴ Subsequently circulated as document A/CN.4/L.266.

That formulation was an improvement on the ECWA proposal, as it did not create a situation of discrimination between developing countries. Many developing countries had emphasized the need to expand trade among themselves, and it was essential to do so outside the overall system created by GATT. Article 21 *bis* was simply a further incentive to help developing countries to arrive at a situation in which they would be able to compete with other States on a non-discriminatory basis. If the article were seen as an element in the progressive development of international law, it would be wholly justifiable for the Commission to take account of existing economic realities.

26. Mr. REUTER said it was his understanding that article 21 *bis* did not establish an obligation to grant advantages under a most-favoured-nation clause to developed countries, but that it established an obligation to grant such advantages to developing countries. Consequently, if a Latin American economic union abolished customs duties on certain products as among its members and a member of that union concluded a treaty containing a most-favoured-nation clause with Hong Kong, the economic union would have to extend to Hong Kong the benefit of that clause.

27. Mr. CALLE y CALLE said that article 21 provided for the first of the exceptions to the application of the most-favoured-nation clause. It dealt with an express exception, embodied in the clause itself, and had been introduced because the Commission shared the concern of mankind at the flagrant imbalance between the economies of countries at differing levels of development. That was a major problem and had given rise to new principles as well as to recognition of the fact that equal treatment of unequal subjects could lead to injustice.

28. In its commentary to article 21, the Commission had first noted General Principle Eight of recommendation A.I.1 adopted by UNCTAD at its first session. According to the secretariat of UNCTAD, it followed from that principle that the application of the most-favoured-nation clause to all countries, regardless of their level of development, would satisfy the conditions of formal equality, but would in fact involve implicit discrimination against the weaker members of the international community. Under the terms of General Principle Eight, developing countries need not extend to developed countries preferential treatment in operation among themselves. Developed countries, for their part, were to grant concessions to all developing countries and extend to those countries all the concessions they granted to one another, without requiring reciprocity.¹⁵

29. Article 21 was based on the principle of equity, which had received wide support in the Sixth Committee of the General Assembly. Various positions had been adopted on the article. Some representa-

¹⁵ See *Yearbook... 1976*, vol. II (Part Two), p. 8, doc. A/31/10, para. 42.