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Summary record of the 1382nd meeting

Topic:
Most-favoured-nation clause

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affected was not in any way compensated by the fact that the common barriers against another commodity, say fruit, were lower than the pre-existing individual barriers. The question of general incidence was totally irrelevant to an individual exporter concerned with the situation with regard to a particular product. That the conditions laid down in article XXIV were almost excessively strict was clear from the fact that the literature on the subject showed that no Customs union had yet been able to prove that it satisfied all of them. Article XXIV of the GATT was accordingly not a very strong argument in favour of the doctrine that there existed a general rule providing for an exception to the most-favoured-nation clause in the case of Customs unions.

39. Nor was there any decisive force in the argument that a great many bilateral treaties embodying the most-favoured-nation clause stated the exception explicitly. On the contrary, that practice rather supported the opposite view. The fact that contracting States should find it necessary to state the exception suggested that, in the absence of an express stipulation, no general exception existed.

40. In actual fact, in cases where a State was bound by two conflicting promises, one under a most-favoured-nation clause and the other under a Customs union, there was some justice in the demands of both States. The dispute was usually settled by bargaining leading to an arrangement to grant compensatory advantages.

41. With regard to the practice of States in the matter, it was of interest to refer to the provisions of article 234 of the Treaty establishing the European Economic Community, known as the "Treaty of Rome"; that article read:

The rights and obligations resulting from conventions concluded prior to the entry into force of this Treaty between one or more Member States, on the one hand, and one or more third countries, on the other hand, shall not be affected by the provisions of this Treaty.

In so far as such conventions are not compatible with this Treaty, the Member State or States concerned shall take all appropriate step to eliminate any incompatibility found to exist. Member States shall, if necessary, assist each other in order to achieve this purpose and shall, where appropriate, adopt a common attitude.

Member States shall, in the application of the conventions referred to in the first paragraph, take due account of the fact that the advantages granted under this Treaty by each Member State form an integral part of the establishment of the Community and are therefore inseparably linked with the creation of common institutions, the conferring of competences upon such institutions and the granting of the same advantages by all other Member States.⁶

He assumed that the reference in the second paragraph of article 234 to the duty of the member State or States concerned to "take all appropriate steps to eliminate any incompatibility found to exist" meant resort to legal means. The EEC member State concerned would have to settle its dispute with the beneficiary of the most-favoured-nation clause by resorting to the peaceful means of settlement indicated in Article 33 of the United Nations Charter. It was thus clear from article 234 of the Treaty

of Rome that the Customs union established by it did not of itself affect the obligations of one of its members under a most-favoured-nation clause.

42. Lastly, he would like to mention article 12 of the Charter of Economic Rights and Duties of States, adopted by the General Assembly in 1974.⁷ That article proclaimed the right of all States to participate in any subregional, regional and interregional co-operation and imposed on all States engaged in such co-operation

the duty to ensure that the policies of those groupings to which they belong correspond to the provisions of the present Charter and are outward-looking, consistent with their international obligations and with the needs of international economic co-operation, and have full regard for the legitimate interests of third countries, especially developing countries.

That article thus recognized the sovereign right of States to enter unions and other groupings—subject, however, to the condition that those groupings were both outward-looking and consistent with the international obligations of their members and did not affect the legitimate interests of third countries, especially developing countries. He believed that to be a satisfactory statement of the existing law.

The meeting rose at 1 p.m.

⁷ General Assembly resolution 3281 (XXIX).

1382nd MEETING

Tuesday, 2 June 1976, at 10.10 a.m.

Chairman: Mr. Abdullah EL-ERIAN

later: Mr. Paul REUTER

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

Most-favoured-nation clause (*continued*)

(A/CN.4/293 and Add.1)

[Item 4 of the agenda]

THE CUSTOMS-UNION ISSUE (*continued*)

1. Mr. USTOR (Special Rapporteur) continuing his introductory remarks on the Customs-union issue, said that at the previous meeting he had referred to the view held in some quarters that there was a customary rule of general international law establishing an implicit exception to the application of the most-favoured-nation clause in circumstances arising from Customs unions. On that point, he drew attention to the 1969 judgment of the International Court of Justice discussed in the

⁶ United Nations, *Treaty Series*, vol. 298, p. 91.

commentary to article 15 of the draft.¹ The International Court of Justice had referred to the possibility of a rule of conventional or contractual origin becoming a customary rule of international law, but had added that such a result could not lightly be regarded as having been attained, since

an indispensable requirement would be that ... State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.

2. In the light of that judgment, it could be safely asserted that no customary rule of international law had emerged which would except from the operation of the most-favoured-nation clause the favours granted under a Customs union. There was in fact strong evidence to the contrary, as he had mentioned at the previous meeting.

3. His views on that point were also supported by the Latin American practice referred to in his seventh report (A/CN.4/293 and Add.1, paras. 127-130). The Latin American States always inserted an appropriate exception relating to Customs unions and similar groupings in the most-favoured-nation clauses contained in all bilateral treaties concluded with States outside those unions or groupings. An undertaking to do so was actually embodied in two Central American integration agreements. That practice showed that the Latin American *opinio juris* strongly supported the view that if a State had obligations under a most-favoured-nation clause, those obligations would apply to benefits granted under a Customs union or similar grouping. It had accordingly been considered necessary to include in the treaties on Central American economic integration special provisions dealing with the matter in their multilateral relations.

4. Those who claimed that a rule of customary international law existed on the alleged implied exception would have to establish the existence of that rule. His own view on the legal effects of entry into a Customs union by a granting State was based on the rule laid down in article 30 (Application of successive treaties relating to the same subject-matter) of the 1969 Vienna Convention on the Law of Treaties.² The provisions of that article made it clear that where a State found itself bound by conflicting obligations under two successive treaties, its obligations under the earlier treaty were not diminished in any way. Before entering into a Customs union, therefore, the granting State would have to withdraw from the treaty containing the most-favoured-nation clause or come to an agreement with the other parties to that treaty on the non-extension to them of the benefits accruing under the Customs union.

5. It was for those reasons that he had not proposed the inclusion in the draft of a provision on the alleged

implied exception. Nor did he propose to include any article describing the present situation as he saw it.

6. It had been argued in some quarters that the entry of a granting State into a Customs union constituted a fundamental change of circumstances which it could invoke as a ground for terminating or withdrawing from the treaty containing the most-favoured-nation clause. That argument must be rejected because the change of circumstances was brought about by the interested party itself, and that party could not be allowed to invoke its own act as a valid ground for terminating the treaty containing the most-favoured-nation clause.

7. It had also been argued that a granting State which joined a Customs union, such as EEC, could not extend the same treatment to outsiders as to members of the union, because that would be precluded by the constitution of the union. That was true of EEC, the constituent instrument of which specified that Customs matters came within the competence of the appropriate EEC bodies. The answer to that argument was that the members of the Customs union were the authors of its constitution; if one of them became bound by a most-favoured-nation clause, it would thus be creating a situation in which it could not fulfil its obligations under the clause. It would therefore have to bear the consequences of the situation it had created.

8. As to the various suggestions which had been made for dealing with the Customs union issue in the draft, one possibility was that the matter should be considered as covered by the provisions of article C (Non-retroactivity of the present draft articles) whereby the draft articles would apply only to most-favoured-nation clauses embodied in treaties concluded after the entry into force of the future convention resulting from that draft. After its entry into force, the States parties to the convention would be able to plan ahead; if they intended to enter into a Customs union or similar grouping, they would have to insert an appropriate exception in any most-favoured-nation clause included in a treaty with an outsider, in order to avoid the application of the clause to benefits granted to members of the union or grouping.

9. Another way of dealing with the problem would be for the parties to exercise their freedom to draft the most-favoured-nation clause, and to restrict its operation, in accordance with the provisions of article D. A State which foresaw the possibility of joining a Customs union or similar grouping could, for example, specify that most-favoured-nation treatment would continue only until it entered into such a union or grouping.

10. The limited importance of the Customs-union issue should also be stressed. The bulk of international trade was carried on under the terms of the GATT, and the matter was settled by article XXIV of the GATT, to which he had referred at the previous meeting.³ Moreover, in most commercial treaties containing a most-favoured-nation clause, an appropriate exception was embodied in the clause.

11. Lastly, he wished to comment briefly on the attitude of the developing countries towards Customs unions and

¹ See *Yearbook... 1975*, vol. II, p. 151, document A/10010/Rev.1, chap. IV, sect. B, para. 58 of the commentary to article 15.

² 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.

³ See 1381st meeting, para. 37.

other economic groupings. Of course, when a developing country was not a member of such a union, its situation was the same as that of any other outsider: its exports to the markets of the States members of the union could be adversely affected by the formation of the union. But if a group of developing countries themselves formed a Customs union, other developing countries which were outside the union would be adversely affected. It was therefore understandable that Latin American countries should adhere to the view that the rights of a beneficiary State under a most-favoured-nation clause were not affected by the entry of the granting State into a Customs union.

12. The situation was different in regard to developed countries which were not members of the union. It raised the broader question of the trend in favour of establishing a rule that a developed beneficiary State was not entitled, under a most-favoured-nation clause, to any treatment extended by a granting developing State to a third developing State (A/CN.4/293 and Add.1, paras. 120-121). That question would be dealt with at a later stage in connexion with the problem of the developing countries, under draft article 21.

13. Mr. HAMBRO said that he had not been altogether convinced by the Special Rapporteur's able and clear presentation of his views. From the outset of the Commission's discussions on the most-favoured-nation clause, he had had occasion to stress the fact that the topic involved two problems of much greater importance than any technical details: the first was that of the preferential treatment to be given to developing countries; the second was the Customs union issue.

14. At the twenty-seventh session, the members of the Commission had all provisionally accepted article 21, dealing with most-favoured-nation clauses in relation to treatment under a generalized system of preferences extended to developing countries. For his part, he might still be prepared to accept article 21; within the limits of the codification of international law, it was the Commission's duty to do all it could to help the developing countries. Nevertheless, he failed to see how the rule embodied in article 21 could be said to form part of customary international law when the same proposition was not accepted for the Customs union issue. The Special Rapporteur had not been able to convince him that the position with regard to Customs unions was different in any way from that regarding the preferential treatment of developing countries. The decision taken on article 21 amounted to the creation of new law; it was not codification of existing customary international law.

15. If the draft articles on the most-favoured-nation clause were to remain silent on the subject of Customs unions and free-trade areas, they would create enormous difficulties for any country joining such a union or area. The Commission could not ignore the fact that the Customs-union exception to the application of the most-favoured-nation clause formed part of the accepted practice of GATT. Paramount importance should be attached to what was actually done in GATT, and Customs unions had been considered in that organization as covered by article XXIV of the General Agreement.

It was true that, in the technical sense, GATT could be said not to constitute an international organization, but it nevertheless functioned like one in every respect and due attention should be paid to its practice in regard to Customs unions.

16. With regard to legal opinion, it should be noted that as early as 1936, the Institute of International Law had adopted a resolution specifying that the beneficiary State under a most-favoured-nation clause should not have the right to invoke it in order to obtain the benefits of treatment resulting from a Customs union.⁴

17. The Special Rapporteur had urged the need to deal with the legal aspects of the problem rather than with its economic and political aspects. That approach was appropriate where codification was concerned, but when the Commission was engaged in formulating rules of progressive development, it could not work in a vacuum and had to pay due attention to economic and political considerations.

18. For all those reasons, he thought the draft should deal with the Customs-union issue. He had the impression that the reluctance in some quarters to accept the exception applicable to Customs unions and free-trade areas was due to an underlying opposition to those groupings themselves. That opposition seemed to be based on a short-sighted view of those groupings as associations of prosperous European countries. In fact, economic regional integration was making progress all over the world. That integration could be of the greatest importance in strengthening the position of developing countries, and the Commission would only be weakening that position if it ignored the need of Customs unions and free-trade areas to develop freely.

19. As he saw it, the Commission could deal with the Customs-union issue in three possible ways. The first was to use the formula adopted by the Institute of International Law and to include in the present draft a provision to the effect that the most-favoured-nation clause did not confer the right to the treatment resulting from a Customs union or a free-trade area.

20. The second possibility was to deal with the Customs union issue in the same manner as the Commission had dealt with the question of the generalized system of preferences in article 21: a rule would be included in the draft to the effect that a beneficiary State was not entitled under a most-favoured-nation clause to any treatment extended by a granting State within a Customs union or a free-trade area.

21. The third possibility was to adopt an intermediate solution modelled on article B. The rule would be drafted to read:

The provisions of the present articles shall not pre-judge any question that may arise from a Customs union or a free-trade area.

22. He hoped that one of those three solutions would be adopted by the Commission at the end of its discussion on the Customs-union issue.

⁴ See *Yearbook... 1969*, vol. II, p. 175, document A/CN.4/213, annex II.

23. Mr. TAMMES said that, as already indicated by the Special Rapporteur, the Customs-union issue was of limited practical significance. The exception appeared to be very widely assured by express stipulations in bilateral treaties and mainly by article XXIV of the GATT. Under the circumstances, the Commission could concentrate on the general legal problem of the inclusion of the exception in some form within the framework of provisions of an otherwise residual nature.

24. At the twenty-seventh session, he had been among those who had found it difficult to accept the inclusion of the Customs-union exception in the draft on the most-favoured-nation clause. Since then, the only additional information received had been the report on the debates in the Sixth Committee, and he had not found anything in those proceedings to change his views.

25. He had been greatly impressed by the abundant material submitted by the Special Rapporteur. The first conclusion that could be drawn from that material was that there was no evidence of any consensus among States regarding the existence of an alleged rule of customary international law which would provide for an implied exception to the application of the most-favoured-nation clause in the case of Customs unions and similar associations of States. The absence of any such consensus meant that, despite the frequency of the exception in treaty practice, it could not be included in the draft as a matter of codification. The Commission could not claim to codify a rule that would be contrary to the terms of article 30 (Application of successive treaties relating to the same subject-matter) of the 1969 Vienna Convention.

26. For the purposes of applying the rule in article 30 of that Convention, the treaty containing the most-favoured-nation clause was the earlier treaty and the treaty setting up the Customs union was the later treaty. The rule in article 30 meant that the granting State could not, by the later treaty with other partners, go back on its promises to the beneficiary State which was not a party to that later treaty.

27. He could not accept the proposition that the Customs-union exception was implicit in any agreement extending most-favoured treatment simply because an explicit exception on the subject was usually included in such agreements. That proposition was reminiscent of the nineteenth century doctrine which had sought to introduce the *rebus sic stantibus* principle into international law in the guise of a fictitious clause which was presumed to be tacitly implied by the parties in their treaties.

28. The Commission could not possibly adopt that approach. Presumptions were based on the most probable case: the more frequently the Customs-union exception was explicitly included in agreements promising most-favoured-nation treatment, the less probable it became that the parties had overlooked that possibility. The *inclusio unius, exclusio alterius* principle, mentioned in the commentary to draft article 15,⁵ would apply. More-

over, to invoke the frequency of the Customs-union exception as an argument for regarding it as customary law would be tantamount to ignoring the possibility of a contrary will on the part of individual parties. The position in regard to the Customs-union exception was different from that regarding the exception for frontier traffic; there was some evidence of *opinio juris* in favour of the latter exception, although its exact scope was not clearly defined.

29. Should the Commission, as he suggested, discard those two approaches, it might consider using its statutory powers to present the Customs-union exception as a rule of progressive development of international law desired by the international community. But the Commission had so far only adopted that course when it had been acting in its own familiar field of the advancement of justice and the reliability of the law; in the field of economic controversy it would be placing itself in great difficulties if it made a choice of its own without any guidance from statements representing world opinion, as it had done in regard to the provisions adopted in favour of developing States.

30. His own conclusion was that, at the first reading of the draft, the time had not yet come for the Commission to take a firm position on the codification or development of international law on the effects of the most-favoured-nation clause on Customs unions and similar associations of States.

31. Mr. SETTE CÂMARA said that in his commentary to article 15 the Special Rapporteur had examined in detail the question whether the Commission should include in its draft a provision establishing an implied exception to the application of the most-favoured-nation clause in situations resulting from the creation of a Customs union or free-trade area. It was quite clear from his lengthy examination of State practice that States could, and often did, agree to exclude the benefits of a Customs union or similar association from the application of the clause. Indeed, R. C. Snyder, a writer quoted by the Special Rapporteur,⁶ had found 280 Customs-union-exception clauses in treaties concluded during the period between the two world wars. That situation had not changed. States found it necessary to include an explicit exception because there was no general rule of international law that would establish the exception as a presumption. Moreover, the abundance of written clauses, far from proving the existence of a general rule of customary law, afforded evidence that the exception was nothing more than a conventional exception.

32. Again, in situations resulting from the application of article XXIV of GATT, it was not possible to infer the existence of an implied exception—quite the contrary. It had to be remembered that the cornerstone of GATT was an unconditional most-favoured-nation clause. Consequently, article XXIV was merely another written clause establishing a specific exception whereby commitments entered into within GATT were made compatible with other commitments. As already pointed out by the Commission in 1975, not a single Customs union or

⁵ *Yearbook... 1975*, vol. II, p. 152, document A/10010/Rev.1, chap. IV, sect. B, para. 60 of the commentary to article 15.

⁶ *Ibid.*, p. 146, para. 41 of the commentary.

free-trade area agreement submitted to the Contracting Parties of GATT had conformed fully to the requirements of article XXIV.⁷ The Contracting Parties had resorted to the system of specific waivers for individual situations. In addition, the Special Rapporteur had emphasized⁸ that article 234 of the Treaty of Rome (Treaty establishing the European Economic Community), did not affect the rights and obligations resulting from pre-existing conventions, pending negotiations on the removal of any incompatibility, such as would result from an exception to the application of most-favoured-nation clauses.

33. After weighing up the discussion in the Sixth Committee, the Special Rapporteur, in his seventh report (A/CN.4/203 and Add.1, sect. 11), had maintained his earlier position, namely that there was no general rule of international law establishing an implied exception in respect of Customs unions and similar associations of States. The Special Rapporteur had also noted the surprising position adopted in the Sixth Committee by States within EEC, because, throughout the existence of that powerful economic unit, its members had abided by the traditional practice of inserting conventional exceptions in treaties. EEC was not the only Customs union, but no other union had adopted such a militant attitude on the question of an implied exception.

34. For those reasons, it would be preferable for the Commission not to attempt to draft a rule establishing a general exception for Customs unions and similar associations. States would continue to exercise their legitimate right to establish conventional exceptions whenever they considered it necessary to do so.

35. Mr. RAMANGASOAVINA stressed the difficulty of the problem under consideration. It had to be decided whether the draft articles should include a rule providing for an exception for Customs unions applicable to commercial treaties or treaties relating to Customs tariffs. Another question was whether, in the absence of an express exception in a treaty granting most-favoured-nation treatment, it should be understood that there was an implicit exception. Clearly, the problem differed according to whether the Customs union had been formed before or after the conclusion of the agreement containing the most-favoured-nation clause. Where the clause had been adopted after the establishment of the Customs union or free-trade area there was no problem, since the granting State had known where it stood when it had concluded an agreement granting special advantages to a beneficiary State. But where the granting State joined a Customs union after having granted another State most-favoured-nation treatment by the clause, the problem which arose was very difficult to solve because of the present development of Customs unions and free-trade areas. The formation of those unions and areas was nothing new, but their development was now likely to assume substantial proportions, especially among the young States which were trying to regroup their forces, the better to resist the external competition which threatened to curtail their possibilities of development.

36. Some States, of course, did not agree that there should be an implicit exception in favour of Customs unions. That attitude was easy to understand, for States attached great importance to the stability of the agreements they had concluded and did not wish to be surprised by subsequent agreements upsetting their long-term plans, which had sometimes required substantial investments. In an effort to solve that problem, the Special Rapporteur hinted at the possibility of resorting to mutual arrangements to rectify a situation which was affecting the estimates of some States. GATT had provided for the possibility of holding such negotiations to adapt situations to needs and to enable countries to form groups to fight against competition in order to accelerate their development.

37. The world today was characterized by two conflicting tendencies: on the one hand, a tendency of States to form groups to fight competition, in order to speed up their economic growth and development; and on the other hand, a tendency to liberalize trade, which was the basic trend in GATT. Moreover, the international community was now inclined to make a distinction between developed and developing countries and to favour developing countries as far as possible. That trend had been manifested, in particular, in the generalized system of preferences, which was intended to help developing countries. But those countries were not the only ones interested in forming groups: the developed countries, too, believed that in the present circumstances they needed to join together within a regional or subregional economic area. For the developing countries of Asia, Africa and Latin America, however, economic integration was not an end in itself, but a means of accelerating development.

38. The remedies proposed by the Special Rapporteur were not calculated to solve the problem. According to the Special Rapporteur, articles C and D could enable Customs unions and free-trade areas to take precautions against an obligation undertaken without all its possible consequences being foreseen, since article C provided for non-retroactivity of the draft articles and article D for the freedom of the parties to restrict the operation of the most-favoured-nation clause when concluding the treaty containing it. Articles C and D would thus make it possible to overcome the disadvantages of the most-favoured-nation clauses contained in future treaties and to avoid disputes. In this view, however, the most-favoured-nation clause was often no more than a provision of medium or long-term convenience, whereas economic integration was a much slower process, but one on which young States placed great hopes.

39. While commending the efforts made by the Special Rapporteur, he considered that the conclusion he had reached was not satisfactory, since it left many uncertainties. So far, the Commission had merely stated the problem and its difficulties without providing any clear solution. It was obviously difficult to lay down a very clear rule providing for an implicit exception, but the Commission should follow the example of GATT and find a formula enabling young States to conclude conventions containing a most-favoured-nation clause without hesitation, even if they hoped eventually to join regional or subregional groups. Those States might

⁷ *Ibid.*, para. 39 of the commentary.

⁸ See 1381st meeting, para. 41.

otherwise consider it dangerous to sign the convention which the Commission was preparing.

Mr. Reuter, First Vice-Chairman, took the chair.

40. Mr. USHAKOV congratulated the Special Rapporteur on his excellent statement and said that he entirely shared his view: there was no generally accepted rule, customary or otherwise, by which the application of the most-favoured-nation clause could be excluded in the case of a Customs union or similar group.

41. In fact, the question did not arise when the Customs union was formed after the conclusion of a most-favoured-nation clause containing an exception in favour of a possible future Customs union—although, incidentally, such a clause was not a most-favoured-nation clause within the meaning of the draft. On the other hand, the question did arise in the case of a true most-favoured-nation clause, in other words, when a State undertook to grant another State treatment no less favourable than the treatment it might grant to any third State whatever. If the granting State then became a member of a Customs union, could it invoke a general rule to exclude the application of the most-favoured-nation clause? There was no doubt that true most-favoured-nation clauses did exist in the modern world, and as envisaged in the draft those clauses did not admit of exceptions *ratione personae*. If they provided that a new treaty must be concluded in the event of the granting State becoming a member of a Customs union, that State was not automatically released from its obligations either: it had to enter into negotiations with the beneficiary State to agree on new conditions.

42. He had thus reached the same conclusions as the Special Rapporteur, albeit by another route. The fact that the most-favoured-nation clause did not admit of any exception *ratione personae* did not mean that States were obliged to conclude true most-favoured-nation clauses. If their interests required it, they could conclude any other clause, which would not be governed by the future convention.

43. Although true most-favoured-nation clauses were relatively rare, the draft articles would certainly be useful. States would know exactly what a true most-favoured-nation clause was, and if they considered that it was not in their interests to conclude one or they desired to make exceptions, they could conclude another clause in full knowledge of the position. Moreover, he was convinced that States which concluded clauses with exceptions would soon opt for true most-favoured-nation clauses, since they were the most profitable for the trade relations of all States.

44. Lastly, he wished to make it clear that some existing situations nevertheless justified exceptions: for example, exceptions in favour of developing countries, land-locked States and frontier zones. It was exceptions in favour of certain third States which were quite impossible, because of the nature of the most-favoured-nation clause, as conceived in the draft.

45. Mr. YASSEEN said that the question being considered by the Commission pertained to the contractual freedom of States, which were free to make exceptions

to the standard most-favoured-nation clause contemplated in the draft. It was not really essential to know whether those exceptions were justified, since there was no question of formulating a rule which would bind the parties against their will. It was necessary to determine what was meant when a treaty containing a most-favoured-nation clause was silent concerning the effect of that clause in regard to a Customs union or free-trade area. Would the clause apply, and would the treatment be that granted to the members of the Customs union? Like the Special Rapporteur and Mr. Hambro, he believed that there was no rule of international law establishing a presumption in favour of Customs unions and free-trade areas. He wondered whether the Commission should establish such a rule as progressive development of international law.

46. Two situations could be distinguished. If the clause was subsequent to the Customs union the question did not arise, since the parties could draft the clause in full knowledge of the facts. If the Customs union was subsequent to the clause, the existence of the clause could prevent the granting State from joining the union or participating in its formation. In such a case, the question arose whether to favour the granting State which wished to become the member of the union, or the beneficiary State. In his view, there was no reason to favour one rather than the other. It might be maintained either that the beneficiary State could have foreseen that the granting State would become a member of a Customs union, or that the granting State itself could have foreseen that possibility. In those circumstances, it would be better to resort to general rules: if granting States wished to restrict the scope of the most-favoured-nation clause, they must do so explicitly. The formation of Customs unions required lengthy preparation, and granting States could usually foresee the formation of such unions and include, in most-favoured-nation clauses they concluded, a provision permitting them not to extend to the beneficiary State the advantages they would grant to the members of a future union.

47. Referring to Mr. Hambro's statement, he said that there was indeed no positive rule in favour either of Customs unions or of developing countries, but that for purposes of the progressive development of international law, assistance should be given to the countries which had the greatest need of it. Today, the universal conscience recognized that it was imperative to assist developing countries to attain a decent level of development. Although he did not consider it necessary to establish a presumption in favour of Customs unions, he was not opposed to accepting, in certain cases, a presumption of an exception justified for sound reasons relating to international life, especially an exception in favour of developing countries.

48. The CHAIRMAN,* speaking as a member of the Commission, expressed his admiration for the moderation and skill with which the Special Rapporteur had presented his thesis. That thesis had been well argued and was no doubt in conformity with political thinking in the Special Rapporteur's country, but as one who held the

* Mr. Reuter.

opposite view, he had not been convinced by it. The question the Commission was discussing had a legal aspect, but it also involved the interests of States, so it was unlikely that the Commission would reach unanimity.

49. It was obvious that the interests of all States were not the same. There were at present only two very great Powers, but many candidates for that title. It was sometimes claimed that the great States of today had little sympathy for Customs unions because they did not need them, but he did not share that view. On the other hand, he agreed that it was the developing countries which particularly needed Customs unions and that they should be able to unite, since their frontiers were entirely arbitrary. There remained the European States, which were small countries, allegedly developed and lacking raw materials, and they were the countries which in the end would be prevented from uniting if the Commission adopted the solution proposed by the Special Rapporteur.

50. From the legal viewpoint the question was linked with several topics which had been or were still being studied by the International Law Commission: the law of treaties, State responsibility, and the question of the uniting of States, on which the Commission had taken a position in 1974.⁹ On that occasion, it had considered only the case of the merger of States, that was to say a "marriage" concluded with a view to forming a new State.

51. Like Mr. Yasseen, he thought it was necessary to consider the case in which the most-favoured-nation clause had been concluded, without exceptions, before the granting State became a member of a Customs union. If the treaty establishing the Customs union prevented compliance with the most-favoured-nation clause, it might be asked whether the conclusion of that treaty did not constitute an international delict. The Vienna Convention on the Law of Treaties was not of much help in answering that question. During the drafting of that Convention, the Commission had wondered whether it should deal with the whole question of contradictory treaties concluded with different States. The Special Rapporteur had even proposed a rule to cover the case in which two bilateral treaties were contradictory but, the Commission had not gone into all the aspects of the question.

52. In the context of the international responsibility of States it was impossible to evade that problem. Did a State commit an international delict if it placed itself, by a voluntary act, in a position in which it could not execute an earlier treaty? If so, the beneficiary State would then have a right of veto. Personally, he did not think an international delict was committed in such a case. It was not a case of fundamental change of circumstances or of *force majeure*, each of which must be external to the person who invoked it.

53. The justification lay in the draft articles on succession of States in respect of treaties, particularly article 30

(Effects of a uniting of States in respect of treaties in force at the date of the succession of States).¹⁰ In paragraph 3 of that article, the Commission had admitted that there were cases in which treaties concluded could no longer be applied when two or more States united voluntarily; but it had not deduced from that that such a union constituted a delict. It might be answered that a union of States was to marriage, what a Customs union was to concubinage.

54. In his opinion, the reason why the exception had been accepted was that there existed a fundamental right of States, which did not have the character of *jus cogens*, namely, the right to unite with other States unless it had expressly been agreed otherwise. It had indeed happened that, in the interests of peace, certain States, such as Austria, had agreed by treaty not to unite with another State. Such a renunciation was lawful when it was express, but it would be an extremely serious matter to prohibit a State from exercising its right to unite without an express renunciation. He did not conclude from that that the granting State was no longer bound by the most-favoured-nation clause; that State, or if not itself the system it had joined, remained under an obligation to provide certain benefits. Consequently, he supported the GATT solution, which was balanced and took account of modern society and its needs. The system which the granting State joined was under an obligation to renegotiate the treaty containing the most-favoured-nation clause. That situation had intentionally not been dealt with in the Vienna Convention on the Law of Treaties.

55. As the Special Rapporteur had pointed out, it was not the large States or the developing countries, but the small States which had an interest in maintaining the most-favoured-nation clause, for they were often prevented from entering a Customs union. An example was the case of Switzerland, which, for political reasons consistent with the interests of the international community, could not join the unions formed by the small or medium-sized States surrounding it.

56. A country which was the beneficiary of a most-favoured-nation clause granted by a State that was no longer able to extend to it the same advantages it gave to the other members of a Customs union which it had joined, was entitled to certain compensatory advantages that must be negotiated with the Customs union. There was thus an obligation to negotiate a new régime of economic relations. In that connexion, it would be idle to pretend that a duty to negotiate did not entail sufficiently precise obligations to be taken seriously. The obligation to negotiate on the basis of equity had now its place in contemporary international law, particularly with regard to the sharing of certain natural resources.

57. To sum up, he would favour a middle course. He found it inadmissible that, under cover of a Customs union, a State should be able to throw overboard all its obligations, including those deriving from a most-favoured-nation clause. On the other hand, he could not accept that certain States should be imprisoned by a rule

⁹ See *Yearbook... 1974*, vol. II (Part One), pp. 252 *et seq.*, document A/9610/Rev.1, chap. II, sect. D, draft articles on succession of States in respect of treaties, part IV.

¹⁰ *Ibid.*

which would give a right of veto to a State that was the beneficiary of a most-favoured-nation clause.

58. Mr. USHAKOV observed that in fact Mr. Reuter's comments did not relate only to treaties containing a most-favoured-nation clause, but to treaties in general. It was indeed open to question whether the existence of a Customs union did not render impossible not only the execution of a treaty containing a most-favoured-nation clause, but also that of other treaties. The question of the effect of Customs unions on the execution of treaties in general was so important that it could become a separate item on the Commission's agenda. In his view, the Commission would come to a dead end if it entered on that difficult course and again attempted to determine whether membership of a Customs union could constitute an international delict.

59. The CHAIRMAN, speaking as a member of the Commission, said that he did not question article 30 of the draft articles on succession of States in respect of treaties; he fully accepted that provision.

60. Mr. BILGE said he had no definite opinion on the advisability of providing for an exception in favour of Customs unions and other similar groups. In a previous statement he had pointed out that the Special Rapporteur did not seem to have taken into consideration Customs unions concluded between developing countries.¹¹ At that time, he had intended to propose an exception in favour of those countries, but he had since noted that the Special Rapporteur had dealt with the problem in chapter II of his report. He would therefore revert to the matter at a later stage.

The meeting rose at 12.55 p.m.

¹¹ See 1380th meeting, para. 42.

1383rd MEETING

Thursday, 3 June 1976, at 10.15 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangsoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Most-favoured-nation clause (*continued*) (A/CN.4/293 and Add.1)

[Item 4 of the agenda]

THE CUSTOMS-UNION ISSUE (*continued*)

1. Sir Francis VALLAT said that, in his introduction, the Special Rapporteur had maintained that there was no customary rule of international law that an exception

in favour of a Customs union was to be implied in a most-favoured-nation clause.¹

2. Mr. Reuter, on the other hand, had advanced a cogent legal argument based on the analogy of the uniting of States² and had pointed out that the sovereignty of States in deciding their future could not be determined by the inclusion of a most-favoured-nation clause in a particular treaty. Mr. Hambro had adopted the middle course; he had agreed that no relevant rule of customary law existed, but he had endorsed the Customs-union exception.³ Other members of the Commission had also agreed that no relevant rule existed, but while some considered that none should be incorporated in the articles, others felt that the draft should include a provision for the developing countries. It was apparent, therefore, that fairly general agreement had emerged on the proposition that there was no rule of customary international law that embodied the Customs-union exception.

3. The Commission, however, was endeavouring to prepare articles which would provide a useful standard for interpreting and applying the clause in the future. He was inclined to follow the course advocated by Mr. Hambro. He could not accept the view of Mr. Ushakov that, if the treatment granted to a third State were excluded from the operation of the clause, then the clause ceased to be a most-favoured-nation clause.⁴ States frequently spoke of most-favoured-nation clauses even when they included exceptions *ratione personae*. Nevertheless, the point had been raised; it affected the scope and application of the articles and some clarification was indispensable if the present work was to progress, for its very foundations had, to some extent, been attacked.

4. Such clarification was indispensable because the draft, when adopted, would have considerable influence as a standard and would presumably be adopted in the form of articles incorporated in a Convention. The International Court of Justice repeatedly referred, for example, to the standard of the Vienna Convention on the Law of Treaties. But from the purely legal point of view, the articles would operate most effectively when incorporated in a convention.

5. He had thought, perhaps mistakenly, that the Commission was seeking to draft residual rules—rules which States could waive by agreement. It now seemed to be suggested that the articles should apply as peremptory rules, which were quite the opposite of residual rules. In that case, it had been suggested, the articles would operate exclusively in respect of a "pure" most-favoured-nation clause and their practical impact would be seriously limited. Parties to a convention containing such clauses would be prohibited from entering subsequently into any agreement containing a most-favoured-nation clause that excluded benefits granted to some third State. If that position was now being adopted, it should be

¹ 1381st meeting, para. 32. 1382nd meeting, para. 2.

² 1382nd meeting, para. 53.

³ *Ibid.*, para. 18.

⁴ *Ibid.*, para. 41.