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Summary record of the 1387th meeting

Topic:
Most-favoured-nation clause

Extract from the Yearbook of the International Law Commission:-
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pendent. Its endeavours to incorporate a general rule in favour of the developing countries in the draft would be only a modest contribution to the law of development.

39. Article 21 (Most-favoured-nation clauses in relation to treatment under a generalized system of preferences) had been adopted tentatively because of some hesitancy as to whether a provision of that kind, dealing to some extent with economic matters rather than law, was in harmony with the remainder of the draft. However, the rule embodied in the article had been adopted by consensus by UNCTAD, and it was only appropriate that the subject of such agreement should become a rule of international law.

40. In the Sixth Committee of the General Assembly, at its thirtieth session, many representatives had welcomed article 21 as progressive development of international law and as a token of the fact that the Commission sought, within its recognized limits, to heed the interests of the developing countries. One objection had been that the generalized system of preferences was, by its very nature, of limited duration. But the idea had already been advanced that the system should continue, at least until such time as the very notion of a "developing country" disappeared. Another objection had been to the wording of the article: it had been maintained that there was no clear dividing line between the concepts of developed and developing countries. However, the problem of distinguishing between those two categories of countries did not arise in regard to article 21. The generalized system of preferences was a compromise system and the donor States themselves determined the countries to which the preferences would apply. A trend had emerged in UNCTAD to urge donor States to broaden the preferences *ratione personae*, so that the preferences would be as universally applicable as possible, and *ratione materiae*, so that the product coverage of the generalized system of preferences would be as wide as possible.

41. Some representatives in the Sixth Committee had held that the Commission was not the most appropriate body to deal with such a technical question, and that article 21, which was closely connected with economic matters, had no place in draft articles of a legal character. In his opinion, it was essential to include an article containing provisions in favour of developing countries and, in the light of the majority view expressed in the Sixth Committee, article 21 should not be deleted. Naturally, since the article referred to the generalized system of preferences, it was concerned with international trade. Up to the present, the question of preferences in such matters as establishment and consular relations had not been raised. The article would indirectly foster the tendency to grant preferential rights to developing countries, because donor States would be free to do so without having to accord the rights to developed countries.

42. Mr. BILGE reminded the Commission that Mr. Hambro had proposed several alternatives for the exception relating to Customs unions and free-trade areas (A/CN.4/L.242). He asked the Special Rapporteur what he thought of those proposals; he himself intended to supplement the proposed texts so that they would also meet the needs of associations of developing countries. Thus amended, those texts might be considered by the Drafting Committee.

43. Mr. USTOR (Special Rapporteur) said that he found the proposed texts unacceptable.

The meeting rose at 12.55 p.m.

1387th MEETING

Thursday, 10 June 1976, at 10.15 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bilge, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Njenga, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Most-favoured-nation clause (*continued*) (A/CN.4/293 and Add.1, A/CN.4/L.242)

[Item 4 of the agenda]

PROVISIONS IN FAVOUR OF DEVELOPING STATES: MOST-FAVOURED-NATION CLAUSES IN RELATION TO TREATMENT UNDER A GENERALIZED SYSTEM OF PREFERENCES (ARTICLE 21) (*concluded*)

1. Mr. USTOR (Special Rapporteur) said that the Commission was fully aware of the situation with regard to article 21, which had been considered at length and tentatively adopted at the twenty-seventh session.[1] In view of the discussion in the Sixth Committee of the General Assembly at its thirtieth session, the draft on the most-favoured-nation clause should not neglect a matter of such importance and interest to the developing countries. Article 21 should therefore be definitively adopted on first reading, and it could now be referred to the Drafting Committee for any changes in wording considered necessary before its adoption.

2. Mr. HAMBRO said it was true that considerable discussion had already taken place on article 21. He was entirely in agreement with the principle embodied in the article and agreed that it should be referred to the Drafting Committee.

3. Mr. YASSEEN said that article 21 was acceptable and could be referred to the Drafting Committee. The international community was now endeavouring to provide developing countries with a means of overcoming their economic difficulties. Several such means had been devised, including the establishment of a non-discriminatory and non-reciprocal system of preferences. It was logical that the most-favoured-nation clause should not hinder the application of that system.

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[1] For the text of the article, see *Yearbook... 1975*, vol. II, p. 121, document A/10010/Rev.1, chap. IV, sect. B.

4. Mr. SETTE CÂMARA said he fully agreed with the Special Rapporteur's views on article 21 and his suggestion that it should be referred to the Drafting Committee. The wording could be improved, to make a more effective statement of the exception in favour of the developing countries.

5. The generalized system of preferences practised by developed States derived from the principle of preferential tariff treatment approved by UNCTAD in 1968.[2] In 1975, the Commission had had an opportunity to discuss the characteristics and limitations of the system, and the modest results it had achieved. Clearly, it was not for the Commission to discuss the substance of the system, but some recent developments should be taken into account. In setting out the basis for the current multilateral trade negotiations, the Tokyo Declaration, adopted by the GATT Ministerial meeting in September 1973,[3] had confirmed a new principle for securing additional advantages for the developing countries, namely, the principle of "differentiated or more favourable treatment". In paragraph 5 of the Declaration, the Ministers also recognized the importance of the application of differential measures to developing countries in ways which would provide special and more favourable treatment for them in areas of the negotiations where that was feasible and appropriate. The concept of "differentiated treatment" was broader than that of preferential treatment, which had been confined to tariffs; it would apply to a wide range of areas in economic co-operation between developing and developed States, and should be reflected in the draft.

6. Article 21 could specify that a beneficiary State was not entitled under a most-favoured-nation clause to any treatment of a preferential or differentiated nature extended by a developed granting State to a developing third State.

7. Mr. ŠAHOVIĆ said that he too was in favour of referring article 21 to the Drafting Committee, which should try to clarify certain questions of interpretation that might be raised by the application of that provision. The Committee should take account, in particular, of the new rules governing international trade, which were not without effect on the operation and even on the nature of the most-favoured-nation clause. It was clear that there was now a certain duality in the rules applied by States, and it was precisely in order to take account of that duality that the Commission had drafted article 21.

8. He was not sure, however, that the contents of that provision really met the needs of the international community and, more precisely, those of developing countries. There was some contradiction between the interpretation the Special Rapporteur gave to article 21 in paragraphs 85 *et seq.* of his seventh report (A/CN.4/293 and Add.1) and the views expressed by certain representatives of States in the Sixth Committee of the General Assembly at its thirtieth session concerning the effect of that provision. The Special Rapporteur considered that article 21 applied only to international trade in the strict sense, whereas in the Sixth Committee, the idea had been advanced that it might apply to other branches of economic relations. Personally, he did not think it possible to restrict the application of article 21 to international trade, not only because certain Governments considered that the article should have a wider scope, but also because the Commission itself had stated on several occasions, that the draft articles did not apply only to trade relations. The Drafting Committee should therefore consider article 21 in a broader context, in order to facilitate its interpretation by States. It would probably be enough to amend the wording slightly, without having to insert a new paragraph.

9. He observed that the matter dealt with in chapter II, section 4 of the report under consideration (A/CN.4/293 and Add.1) entitled "Most-favoured-nation clauses in relation to trade among developing countries", would have to be considered later, independently of the problems raised by article 21.

10. Mr. REUTER said he was in favour of referring article 21 to the Drafting Committee. The text could no doubt be improved, but it should not be expected that the Committee could arrive at rigorous and perfect wording.

11. In his opinion article 21 did not relate only to the generalized system of preferences, but also to the principles which would govern the new international economic order. The draft articles were thus being prepared subject to the general reservation that none of their provisions would affect the general principles in process of formation, which related not only to the generalized system of preferences, but also to matters such as the raw materials régime. Those principles were still too uncertain to be considered as being widely accepted. Thus the principle of self-selection was, for the time being, only an empirical principle, which could be understood in several ways. Similarly, the developing countries were not a simple category, since some of them were more underprivileged than others.

12. The Commission did not have to take a stand on those questions; it should confine itself to introducing into its draft a *renvoi* to the new law, without trying to define the principles applicable or to decide, for example, the raw materials régime, the classification of developing countries, the relations between those countries or the extension of article 21 to matters other than international trade. Hence the Commission should rest content with a general provision, but make its intentions perfectly clear in the commentary.

13. Mr. USHAKOV said he was in favour of article 21, as he had been at the twenty-seventh session. Like Mr. Reuter, he wished to stress that it was not the Commission's task to establish the rules of the new international economic law. The only purpose of article 21 was to show that the existence of a most-favoured-nation clause should not prevent a developed State from grant-

[2] See *Proceedings of the United Nations Conference on Trade and Development, Second Session*, vol. I and Corr.1 and 3 and Add.1-2, *Report and Annexes* (United Nations publication, Sales No. E.68.II.D.14), p. 38, annex IA, resolution 21 (II).

[3] See GATT, *Basic Instruments and Selected Documents: Twentieth Supplement* (Sales No.: GATT/1974-1), p. 19.

ing preferences to a developing State, in accordance with a generalized system such as that of UNCTAD.

14. As the Special Rapporteur had stressed in his commentary, the scope of that exception depended on the contents of the generalized system of preferences. If that system covered economic relations in general, article 21 would have the same scope. If it applied to other spheres, the scope of article 21 would be similarly widened. It was not for the Commission to settle the content of the generalized system of preferences; it should merely indicate that neither the development nor the application of that system could be obstructed by the existence of most-favoured-nation clauses. A developed beneficiary State could not invoke a most-favoured-nation clause to claim preferences granted by another developed State to all the developing States it had chosen; it was the granting State which chose the developing countries to which it intended to grant preferences. As the Special Rapporteur had pointed out, the circle of developing countries was not necessarily the same for all developed countries.

15. Another characteristic of the system was that the preferences in question were granted without reciprocity. By excluding the application of the most-favoured-nation clause between two developed States, article 21 would facilitate the application of the generalized system of preferences, but its usefulness would depend directly on the content of that system.

16. Mr. PINTO said that article 21 would of course be of some assistance to the developing countries, at least indirectly. At the twenty-seventh session he had objected to the reference to a generalized system of preferences, and he would prefer the tentative formulation in paragraph 121 of the Special Rapporteur's report which read:

> A developed beneficiary State is not entitled under a most-favoured-nation clause to any treatment extended by a granting developing State to a third developing State for the purpose of promoting the expansion of their mutual trade.

The objections mentioned in subsequent paragraphs of the report were not, in his opinion, entirely persuasive, and it would have been preferable for the Commission to have adopted that formulation, despite the absence of State practice in support of it.

17. Article 21 in its present form spoke of "a generalized system of preferences", and it was questionable whether that expression had any precise meaning. References were sometimes made to "*the* generalized system of preferences" and also to "general schemes of preferences", although the latter were almost exclusively bilateral in character. It seemed that the relationships under such systems or schemes were not legal or binding. He wondered whether the most-favoured-nation clause would apply if a country did not receive preferences under the system or scheme as of right. Article 15 of the draft seemed to indicate that treatment should be extended under a bilateral or multilateral agreement—in other words, a form of legal obligation should exist between the granting State and the third State. Again, article 13 established the irrelevance of the fact that treatment was extended gratuitously or against compensation. It was important to determine whether the recipient of the treatment accorded under a generalized scheme of preferences was entitled to demand such treatment and whether the clause operated in such cases. He feared that, while the Commission might be unanimous in its view of the purpose of article 21, others could well regard it as irrelevant.

18. Mr. RAMANGASOAVINA said he agreed that article 21 should be referred to the Drafting Committee. It was essential for the draft articles to contain a provision making it clear that most-favoured-nation clauses must not prevent developed States from granting preferences to developing countries as part of international assistance designed to speed up their economic growth and promote their development. Although it was true that the idea expressed in article 21 could be developed further, the provision was nevertheless quite satisfactory in its present negative form. It constituted some kind of means of action under the International Development Strategy for the Second United Nations Development Decade, as presented in General Assembly resolution 2626 (XXV).

19. The Special Rapporteur had tried to state a rule relating to a field which was constantly evolving, and in which there was still much uncertainty. It was the first time that the notion of a generalized system of preferences had appeared in a text produced by the Commission. Article 21 related to the international law of development, which was in the process of formation and which had certain repercussions on the operation of the most-favoured-nation clause. The effectiveness of the article would depend on the maintenance, development and improvement of the generalized system of preferences and, in particular, on the increase in the number of products covered by that system and on the easing and unification of rules of origin and other aspects of national schemes.

20. It was quite certain, however, that article 21 would not suffice to allay all the fears which might be felt about the proper functioning of the generalized system of preferences. The Special Rapporteur himself had emphasized the potential threat represented by multilateral trade negotiations (A/CN.4/293 and Add.1, paras. 97-100).

21. As to the principle of self-selection, he thought it quite normal that granting States should have the right to decide not only what products they would include in the generalized system of preferences, but also the identity of their future partners. That principle, however, made the operation of the system even more uncertain. It was nevertheless gratifying to note the good will of both the market-economy countries and the socialist countries, which had shown themselves willing to apply the generalized system of preferences and to renounce claims to most-favoured-nation treatment. GATT had also encouraged the granting of preferential treatment and the renunciation of rights deriving from the most-favoured-nation clause.

22. With regard to the scope of article 21, he maintained that in the present circumstances it applied

essentially to international trade, but that it might apply to other matters, since the generalized system of preferences could be expanded.

23. Mr. TABIBI said that when two thirds of the world was experiencing hunger and calling for assistance, the needs of the developing countries were such that the Commission should certainly endeavour to assist them —and it was clear that all the members favoured the adoption of article 21, subject to improvements in the wording.

24. The generalized system of preferences had serious limitations; for example, it did not cover manufactures or semi-manufactures. As the Special Rapporteur had pointed out, however, article 21, while it would not remedy all the ills of the developing countries, would none the less constitute a step forward. It had been warmly supported in the Sixth Committee, and many representatives had called upon the Commission to go further and not to confine itself to that one article in favour of the developing world. Some representatives had even maintained that the Commission should seek to improve the Charter of Economic Rights and Duties of States,[4] so that it could become an enforceable legal instrument.

25. He fully supported the definitive adoption of article 21 on first reading, and was grateful to the Special Rapporteur for proposing it.

26. Mr. KEARNEY said that he endorsed article 21, hoping that it would serve as a useful contribution to the expansion of international trade between developed and developing countries and recognizing that it was a modest step, but one that the Commission should take.

27. If it was to go beyond the scope of article 21, however, the Commission would have to deal, as in the case of Customs unions and economic associations, with complex questions that could not be answered on a factual basis. UNCTAD had issued a number of reports on the generalized system of preferences, pointing to problems inherent in that system—problems which related not so much to law as to the functioning of the world economic system and which could not easily be solved by general legal rules. Further legal developments could probably be expected as a result of the findings of those reports, but it was too early at the present stage to attempt to formulate new principles.

28. With regard to a point raised by Mr. Pinto,[5] he had assumed that, because of the terms of article 5, it was not necessary for the draft to incorporate any requirement to the effect that the treatment accorded to a third State must be extended on the basis of a legal obligation. It was possible, however, that the wording of article 15 might be misinterpreted as a limitation on article 5. It would be advisable to state in the commentary that such was not the intention of the Commission and to reconsider the matter during the second reading.

29. Mr. MARTÍNEZ MORENO said that he supported the adoption of article 21; it should be referred to the Drafting Committee in order to determine whether the wording could be improved.

30. As to the substance of the article, he would have preferred a broader rule which was not confined to a generalized system of preferences. The system, although intended to enhance the trade of the developing States and to improve the terms of trade, did not keep pace with the needs of the developing countries. To begin with, the application of the system was of limited duration and it was by no means certain that it would be extended. Again, it was voluntary in character and the fact that the granting State could at any time alter the system or terminate its application, meant that the position of the beneficiary State was insecure. For example, a beneficiary State might decide to increase its output of commodities in the hope of broadening its markets as a result of receiving preferential treatment under the generalized system of preferences in the industrialized countries, only to find itself in an extremely difficult situation because the application of the system had suddenly been terminated unilaterally.

31. The fact was that in international commerce the terms of trade were constantly deteriorating and the prices of manufactured articles from the industrialized countries were getting higher in relation to the prices of the raw materials supplied by the developing countries. Consequently, if the aim was to establish a rule that would make for a more equitable system, the text should be on the lines suggested in paragraph 21 of the Special Rapporteur's report. He agreed with Mr. Kearney that the Commission could not solve such complex economic problems by means of general rules of law, but a set of draft articles on the most-favoured-nation clause could certainly incorporate a broader principle establishing more equitable treatment for the developing countries in the sphere of international trade.

32. At the present juncture, however, he was prepared to agree to article 21, which would doubtless meet with unanimous approval in the Sixth Committee.

33. Mr. QUENTIN-BAXTER said that he had no difficulty with article 21, which had its obvious and inescapable place in the draft. He wished, however, to point out how much the views of members had developed in the past year. At the previous session it had seemed to them a formidable matter to speak in terms of an exception of some generality relating to preferences and affecting the system of strict rules on the most-favoured-nation clause. Since then, the article had been discussed in the Sixth Committee and the Special Rapporteur was to be commended for placing before that Committee a rich body of information which had made for a useful discussion.

34. The provisions of article 21 were not in a real sense trail-blazing. They had been aptly described by Mr. Reuter as a system of cross-referencing (*renvoi*), but they nevertheless remained very important. They would serve to relate the aged and respected institution of the most-favoured-nation clause to new developments in international organizations.

35. The perceptions of the members of the Commission, and those of representatives in the Sixth Committee,

[4] General Assembly resolution 3281 (XXIX).

[5] See para. 17 above.

regarding the nature of the Commission's task in the matter had also developed considerably, and they had done so in a desirable manner. There was no longer any unspoken anxiety that the most-favoured-nation clause was in itself an institution of which new countries and developing countries should be suspicious. A more balanced view was now taken on that point. The most-favoured-nation clause was recognized as being still alive and was acknowledged as being useful in certain cases to the new and developing countries themselves; in such matters as international trade, the clause could secure for those countries what they could not secure in an interminable round of bilateral negotiations.

36. The Commission now had to decide whether article 21 should be widened and if so in what manner. Should it take a negative decision, the Commission would have to decide what explanation to give to the Sixth Committee in response to the view—echoed in the present discussion—which favoured the introduction of supplementary rules into article 21. It would be helpful to remember that the present draft represented a set of residual rules which would be of great help to States when framing international agreements containing the most-favoured-nation clause. The rules which would be included in the draft would not bring about any considerable changes in the interpretation of old agreements containing the clause, or for that matter in any new agreements of that kind.

37. The set of rules embodied in the draft was such that States would not take them for granted, but would tend to incorporate them in their international agreements. It would be a long time before States became parties to the convention which would emerge from the present draft articles, and there would for some time be a certain element of doubt regarding their authority—hence the need to strengthen that authority by introducing specific provisions in bilateral agreements.

38. At the same time, the Commission should not be tempted to take a wrong view of the scope of the rule in article 21. Trade questions and economic questions were a major preoccupation of a great many bodies in the United Nations family. There was therefore a natural tendency in those bodies to urge that every available forum—including the International Law Commission—should press on with the development of the law on those subjects. In the circumstances, the Commission should bear carefully in mind the limited character of its experience and, still more, of its influence in the particular field of trade agreements. The Commission's task was to note the developments which had occurred rather than to lead those developments in a way which was unlikely to receive acceptance.

39. The discussion had not revealed any very settled views on which to base further articles to supplement article 21. Accordingly, he believed that the Commission should not undertake that task, but should clearly show the General Assembly that it felt both understanding and sympathy for the demand for such supplementary provisions. In its report, the Commission should stress that it was only completing the first reading of the draft articles and that, at the second reading, it would undoubtedly have occasion to examine contemporary developments with great care; at that point, it would be possible to discern whether a more definite trend emerged in favour of covering matters that were at present outside the scope of article 21 as drafted by the Special Rapporteur.

40. If the Commission adopted that approach, it would be able to persuade the General Assembly that it had acted wisely in leaving article 21 as it stood on the first reading. When the time came for dealing with matters now outside the scope of the article, however, the Commission should not be unduly influenced by developments which were of a topical character; it should remember that it was drafting a text that would have to stand the test of time for many years.

41. The CHAIRMAN, speaking as a member of the Commission, said that at the twenty-seventh session he had unfortunately been unable to attend the few meetings at which the Commission had discussed the then article 0 proposed by the Special Rapporteur to deal with the exception to the generalized system of preferences.[6] He therefore wished to state his opinion on that problem, which the present article 21 was intended to regulate.

42. At its twenty-seventh session, the Commission had provisionally adopted article 21 "subject to further consideration and possible improvement on first reading" at the present session.[7] The Special Rapporteur had stressed that the article was in the nature of progressive development, and concern had been expressed that the Commission might possibly be entering into economic questions which were within the competence of other bodies. That being the situation, the Commission should be guided by considerations of theoretical validity and practical attainability.

43. There could be no doubt about the validity of the theoretical basis of the article. The United Nations Charter itself rested on the assumption that the international community would strive to create the necessary conditions for economic and social progress. The Preamble to the Charter called not only for the establishment of "conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained", but also for the promotion of "social progress and better standards of life in larger freedom". Chapter IX of the Charter, on international economic and social co-operation, began with Article 55 which expressly recognized that "the creation of conditions of stability and well-being" were "necessary for peaceful and friendly relations among nations". The consolidation of the branch of law now under discussion therefore answered a basic purpose of the Charter, since it would help developing countries to extricate themselves from a system which had placed them at a disadvantage before the adoption of the Charter.

44. With regard to practical attainability, it was worth remembering that draft article 21 was the outcome of a

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[6] See *Yearbook... 1975*, vol. I, pp. 190 *et seq.*, 1341st to 1344th meetings.

[7] *Ibid.*, vol. II, p. 121, document A/10010/Rev.1, foot-note 414.

very thorough study of the work of international bodies. In his report, the Special Rapporteur had cited the relevant provisions of the International Covenant on Economic, Social and Cultural Rights, in particular those of article 2, paragraph 3, which contained an exception in favour of developing countries that was comparable to the one under discussion (A/CN.4/293 and Add.1, para. 123). The Special Rapporteur had also based his work on the considerable body of law being evolved by UNCTAD. In his oral introduction of article 0 at the twenty-seventh session he had rightly concluded that "the need of developing countries for preferences in the form of exceptions to the [most-favoured-nation] clause in international trade could be given expression in legal rules".[8]

45. As early as 1973, the Commission had stressed that it did not intend to deal with matters not included in its functions, but that it wished to devote special attention to the manner in which exceptions to the most-favoured-nation clause in the field of international trade could be given expression in legal rules.[9] That approach had been endorsed by the General Assembly, which had given a good reception to article 21 in its provisional form. It should now be adopted on first reading, on the same basis as the other articles, on the understanding that the Commission would have an opportunity to reconsider it on second reading.

46. With regard to the scope of article 21, at the twenty-seventh session the Special Rapporteur had said:

> It was true that that system [the generalized system of preferences] was rather limited and that it did not fully meet the expectations of the developing countries; but it did represent a compromise reached within the framework of UNCTAD. He believed it was valuable to translate the results of that compromise into a legal rule ...[10]

Following the comments made by some members during the present discussion, the Drafting Committee should consider the possibility of broadening the scope of the exceptions in favour of the developing countries by adding further articles to article 21.

47. He did not think it was necessary to adopt a definition of the term "developing countries" in the present draft articles: its use in the United Nations and in UNCTAD showed a consistent pattern.

48. He believed that article 21 should endorse, as a rule of law, the principle that the most-favoured-nation clause should not operate to the detriment of developing countries. The modalities of application of that principle were a matter for *renvoi* as Mr. Reuter had pointed out.

49. Mr. AGO said that, in article 21, the Commission was in the process of formulating a general rule of international law. In doing so, however, it had to refer to a notion which was neither general nor stable: the notion of a generalized system of preferences, which, as the Special Rapporteur had stressed, was not an international system, but an aggregate of national systems which differed from one another. That system was further complicated by the principle of self-selection, which relied on decisions taken at the national level, not at the international level.

50. The Special Rapporteur had said that that system of preferences should not be reciprocal; but if there was any element of reciprocity in an agreement of that kind, should it be excluded from the system referred to in article 21? In other words, if there was any element of reciprocity in a system of preferences, was that enough to enable a State benefiting from the most-favoured-nation clause to claim that the system should be applied to it?

51. The Special Rapporteur had also said that the system of preferences should not be discriminatory; but was that really possible in the case of national systems? Since each State had some freedom of choice, any system of preferences necessarily contained an element of discrimination. That being so, it would be useless to try to draft a perfect article. He was therefore in favour of requesting the Drafting Committee to do its best in the matter.

52. With regard to the question of the settlement of disputes, it was obviously of primary importance in the present context, as the Special Rapporteur had stressed. Hence it was hardly sufficient merely to observe, as the Special Rapporteur had done in paragraph 132 of his report, that "As the articles on the most-favoured-nation clause are conceived as a supplement to the Vienna Convention [on the Law of Treaties], the relevant provisions of that Convention will also apply when a dispute arises in connexion with a most-favoured-nation clause". It was, indeed, by no means certain that those provisions would apply automatically.

53. Mr. USTOR (Special Rapporteur) said that the very enlightening discussion had shown that there was general agreement on the contents of article 21, though some doubts had naturally been expressed about its complex nature.

54. The useful drafting improvements suggested by Mr. Sette Câmara should be referred to the Drafting Committee.

55. Several members, including Mr. Šahović, Mr. Pinto, Mr. Ramangasoavina and Mr. Martínez Moreno, shared his own concern regarding the possibility, and the manner, of broadening the exception stipulated in article 21, so as to improve the position of the developing countries. In chapter II, section 4 of his seventh report, he had dealt with the question of improving trade between developing countries and had explained what ideas could be introduced into the draft articles for that purpose. At the next meeting, he would introduce his suggestions on that point. Article 21 itself, however, dealt with the generalized system of preferences, which was clearly a system applying to Customs matters and nothing else.

56. It had been suggested by Mr. Šahović that preferential treatment, in the form of an exception to the most-favoured-nation clause, should be extended to

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[8] *Ibid.*, vol. I, p. 190, 1341st meeting, para. 2.

[9] *Yearbook... 1973*, vol. II, p. 211, document A/9010/Rev.1, para. 114.

[10] *Yearbook... 1975*, vol. I, p. 206, 1343rd meeting, para. 55.

developing countries in matters other than international trade.[11] It was true that the developing countries required help in matters other than trade: they needed cheap credits or soft loans, outright money grants, technical assistance and know-how. Those matters, however, did not lend themselves to the operation of the most-favoured-nation clause and there was no occasion to establish any exception for them on the lines of article 21. He had not seen the most-favoured-nation clause in any agreement on matters other than trade which would lend themselves to such an exception. Establishment treaties often contained most-favoured-nation clauses, but the developing countries were not particularly interested in their nationals being given easier conditions of establishment, or the right to practise certain professions in the developed countries. Another example was that of consular conventions, which often contained a most-favoured-nation clause. The developing countries were not in any way interested in a preferential treatment in that respect; they were quite satisfied with the level of consular facilities, privileges and immunities granted to all countries.

57. As far as he knew, there had not been any desire expressed by developing countries, either in international organizations or elsewhere, for preferential treatment in matters other than international trade. There was perhaps one field in which such a desire was conceivable, namely that of shipping: developing countries might well wish to have special advantages for their merchant fleets, over and above those which were obtained by other countries. It should be noted, however, that if such preferential treatment was extended to the shipping of developing countries, its benefit might really go to multinational companies using the flags of these countries as flags of convenience.

58. A similar situation could arise in regard to international trade itself. It was only where a foreign trade monopoly operated under strict State supervision—as in socialist countries—that the benefit of the preferential treatment was certain to go to the developing country itself and not to outside interests which had set up companies under its laws.

59. The point raised by Mr. Pinto had been answered by Mr. Kearney;[12] it could be suitably dealt with in the commentaries to articles 5 and 15.

60. He would refer to article 21 again when he introduced, at the next meeting, section 4 of chapter II of his report, "Most-favoured-nation clauses in relation to trade among developing countries".

61. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 21 to the Drafting Committee for consideration in the light of the suggestions made during the discussion.

It was so agreed.[13]

The meeting rose at 1 p.m.

[11] See para. 8 above.

[12] See para. 28 above.

[13] For consideration of the text proposed by the Drafting Committee, see 1404th meeting, paras. 9-11.

1388th MEETING

Friday, 11 June 1976, at 10.15 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bilge, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Most-favoured-nation clause (*continued*) (A/CN.4/293 and Add.1, A/CN.4/L.242)

[Item 4 of the agenda]

PROVISIONS IN FAVOUR OF DEVELOPING STATES: MOST-FAVOURED-NATION CLAUSES IN RELATION TO TRADE AMONG DEVELOPING COUNTRIES

1. The CHAIRMAN invited the Special Rapporteur to introduce section 4 of chapter II of his seventh report (A/CN.4/293 and Add.1).

2. Mr. USTOR (Special Rapporteur) reminded the Commission that in discussing article 21, he had concluded that in the present state of economic relations in the world it was only in the sphere of trade that the draft articles could establish special rights for developing countries in the form of exceptions to the operation of the most-favoured-nation clause.[1] He now wished to put forward some thoughts on further provisions to assist developing countries which might be considered at a later stage. The Commission would have to consider, in particular, whether a rule could be framed establishing an exception to the operation of the most-favoured-nation clause in regard to advantages granted by developing countries to each other, a question which had been raised by the representative of Yugoslavia in the Sixth Committee of the General Assembly.[2]

3. As explained in his report, he had found a considerable number of instruments, resolutions and declarations which expressed the wish that developed countries should help to promote co-operation among developing countries and, to that end, waive the benefit of the most-favoured-nation clause in regard to favours accorded by one developing country to another. An important example was the "Concerted declaration on trade expansion, economic co-operation and regional integration among developing countries" adopted at the second session of UNCTAD in 1968, which contained "declarations of support" by the developed market-economy countries and the developed socialist countries.[3] In GATT, it had been established that, in certain very strictly defined circumstances, the developed countries could be asked to waive their most-favoured-nation rights with regard to

[1] See 1387th meeting, para. 56.

[2] See A/CN.4/293 and Add.1, para. 108.

[3] *Ibid.*, para. 114.